

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Jason M. RYAN
Corporal (E-4), U. S. Marine Corps**

NMCCA 200401577

Decided 29 March 2007

Sentence adjudged 13 April 2004. Military Judge: P.H. McConnell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

LT J.M. LOKEY, JAGC, USN, Appellate Defense Counsel
Capt BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A members panel with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of violating a lawful general order, four specifications of maltreatment, and assault, in violation of Articles 92, 93, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, and 928. The appellant was sentenced to confinement for 3 months, hard labor without confinement for 3 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

We have examined the record of trial, the appellant's five assignments of error,¹ and the Government's response. We

¹ I. THE MILITARY JUDGE ERRED WHEN HE FAILED TO DISMISS CHARGE II FOR CONTAINING A MAJOR CHANGE.

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.

Background

The appellant was deployed as a Marine squad leader with a portion of 3d Battalion, 6th Marine Regiment, a security force sent to Guantanamo Bay, Cuba, from June 2002 until July 2003. Lance Corporal (LCpl) J, LCpl S, Private First Class (PFC) D, and PFC S, were members of the appellant's squad. During this deployment, the appellant hazed and maltreated these Marines, and in one instance, assaulted a Marine under his charge. Essentially, the appellant was administering his own brand of punishment to these Marines when he found them performing in what he perceived to be a substandard manner. CA's Action of 28 Oct 2004.

Major versus Minor Change

In his first assignment of error, the appellant contends that the military judge abused his discretion by allowing the Government to amend the specification under Charge II, alleging a failure to obey a lawful general order under Article 92, UCMJ. Specifically, the Government added the numbers "1700.28" after the words "Marine Corps Order" and added the words "on divers occasions" before the words "between August 2003 and October 2003,". The appellant contends that the amendments effected an impermissible major change, contrary to RULE FOR COURTS-MARTIAL 603, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), because it added substantial material and was of such a nature that it was likely

II. THE MILITARY JUDGE ERRED WHEN HE FAILED TO TAILOR A SPILLOVER INSTRUCTION FOR THE MEMBERS AFTER TRIAL COUNSEL'S INAPPROPRIATE CLOSING ARGUMENT.

III. CORPORAL RYAN, USMC, WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL WAS PREVENTED FROM ADEQUATELY PREPARING FOR TRIAL.

IV. THE GOVERNMENT FAILED TO PRESENT FACTUALLY AND LEGALLY SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT CORPORAL RYAN, USMC, COMMITTED THE CHARGED OFFENSES. FURTHERMORE, THE GOVERNMENT EVIDENCE WAS NOT ENOUGH TO OVERCOME THE GOOD MILITARY CHARACTER EVIDENCE PRESENTED BY THE DEFENSE.

V. A BAD-CONDUCT DISCHARGE IS AN INAPPROPRIATELY SEVERE SENTENCE GIVEN THE NATURE AND CIRCUMSTANCES OF THE OFFENSES AND THE SIGNIFICANT MATTERS IN EXTENUATION AND MITIGATION. ADDITIONALLY, THE PART OF THE SENTENCE RELATING TO THE BAD-CONDUCT DISCHARGE IS HIGHLY DISPARATE FROM THE SENTENCE OF OTHER MARINES WHO WERE INVOLVED IN SIMILAR CONDUCT.

to mislead the accused as to the offense charged. Appellant's Brief of 13 Jan 2006 at 5. We find that the amendments to the specification effected a minor change and that the military judge did not violate R.C.M. 603 by permitting the amendments.

R.C.M. 603 governs changes made to charges and specifications. R.C.M. 603(b) permits the Government to make minor amendments to a specification at any time prior to arraignment. After arraignment, only the military judge may permit minor changes to be made provided "no substantial right of the accused is prejudiced." R.C.M. 603(c). Minor charges are defined by R.C.M. 603(a) as "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to offenses charged." The Discussion to R.C.M. 603(a) notes that minor changes include those changes "necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight error." In contrast, R.C.M. 603(d) permits major changes to be made over the objection of the accused only if the charges are re-preferred. The question before us then is whether the amendment to the specification of Charge II was a major or minor change.

In the sole specification under Charge II, the appellant was charged with violating a lawful general order. Specifically, the specification alleged that the appellant did: "between about August 2003 and October 2003, violate a lawful general order, to wit: paragraph 4, Marine Corps Order, dated 18 June 1997, by wrongfully hazing" the named Marines. Charge Sheet. At the Article 32, UCMJ, pretrial investigation, the appellant fully explored the conduct at issue in this specification and charge. Moreover, upon completion of the Article 32 investigation, the appellant received a copy of the investigating officer's report which recommended inclusion of the additional language specifying the number of the Marine Corps Order violated, and the addition of the words "divers occasions". Investigating Officer's Report of 16 Jan 2004. Prior to referral, the Government amended the specification to include the additional language. Charge Sheet. At his arraignment, the appellant did not object to the changes. Record at 25. Only later, during pretrial motions, did the appellant object to the changes. Record 104, 123-24; Appellate Exhibit VIII.

We find that the amendments to the specification are minor changes within the meaning of R.C.M. 603(a), to correct inartful drafting and obvious scrivener's errors. The amendments do not

alter the gravamen of the offense, nor the misconduct by which the appellant allegedly violated that provision. The changes do not add any substantial matter that was not already fairly included in the previously preferred charges. There is no evidence that the appellant was misled, surprised, or hindered in his trial preparation in any way by these changes. Furthermore, we are convinced that under the facts of this case, there was no possible prejudice to the appellant as a result of the changes. Thus, we find that the military judge did not violate R.C.M. 603 by determining that these were minor changes. This assignment of error without merit.

Spillover Instruction

In his second assignment of error, the appellant argues that the military judge erred when he did not tailor the spillover instruction after the trial counsel's alleged inappropriate argument. Appellant's Brief at 7.² The appellant asks this court to set aside the findings and sentence and dismiss the charges and specifications. We do not find error, therefore, we decline to grant relief.

We review a military judge's decision not to tailor a defense-requested instruction for an abuse of discretion. *United States v. Myers*, 51 M.J. 570, 578 (N.M.Ct.Crim.App. 1999)(citing *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)).

In his rebuttal argument on findings, the trial counsel argued:

Should you find for instance the Article 93, the maltreatment. If you take a look at the elements and you say, [m]aybe that is not Article 93. The government believes at the barest minimum all of these factors constitute -- take a look at all of them, the bare minimum you have [is] hazing by the accused.

Record at 667.

At the conclusion of the trial counsel's argument, the trial defense requested a "more narrowly tailored" spillover instruction. *Id.* at 668. The military judge

² We note that the appellant's counsel indicates in his brief that the trial defense counsel made an immediate objection to the Government's argument, when in fact, there was no objection during the argument, but rather a request for a more narrowly tailored instruction at the completion of argument. Record at 668.

denied this request, and instead, gave a general spillover instruction, stating:

Spillover. Each offense charged must stand on its own and you must keep the evidence of each offense separate. The burden is on the [G]overnment to prove each element of each offense by legal and competent evidence beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

Id. at 691.

The appellant now alleges that the military judge erred in not tailoring the spillover instruction because there was great danger of spillover since much of the testimony was overlapping and confusing. Appellant's Brief at 8. We disagree.

It is axiomatic that the fundamental fairness guarantee of the Due Process Clause of the Constitution requires the prosecution to prove each and every element of every offense alleged against an accused by legal and competent evidence beyond a reasonable doubt. *Myers*, 51 M.J. at 578 (citing *Estelle v. McGuire*, 502 U.S. 62, 78 (1991)(O'Connor, J., concurring in part and dissenting in part)). When separate offenses are joined together for trial at the same time, there is a very real possibility that members will use the evidence of one of the crimes to infer a criminal disposition on the part of an accused in regard to other crimes charged. *Myers*, 51 M.J. at 579. "Generally, the law seeks to prevent juries from cumulating the evidence of the various crimes charged to find guilt when, if considered separately, they would not so find." *Id.* (citing *Drew v. United States*, 331 F. 2d 85, 87 (D.C. Cir. 1964)). This court has held that "[w]e are apparently comfortable in military practice with the assumption that properly drafted and delivered instructions are sufficient to prevent juries from cumulating evidence, thus avoiding improper spillover." *Myers*, 51 M.J. at 579. Absent evidence to the contrary, courts of military appeals may presume that members followed the military judge's instructions. *Loving*, 41 M.J. at 235; *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991).

Based on our review of this case, we find that the military judge's decision to give a standard spillover instruction was proper and that no spillover occurred. Contrary to the appellant's assertion, the trial counsel's argument was proper

comment on the related offenses and the evidence before the court. Trial counsel was not making a spill-over "smoke and fire" argument which tied the two offenses together by cumulating the evidence. Nor was trial counsel urging the use of evidence of one charge to bolster the other charge. Rather, the trial counsel was arguing that if the same evidence could not be used to support each of the elements under both the Article 93 and Article 92 charge, then it could be used to support the orders violation charge under Article 92. Clearly, trial counsel was arguing for contingencies of proof, and not arguing for the merging of evidence. Hence, we find there was no need for a tailored instruction on spillover. Moreover, the military judge's instructions were sufficient to focus the attention of the court members on each charge and specification and to keep the evidence separate for each specification. The members properly applied the military judge's instructions and distinguished between the two charges as evidenced by the fact that they found the appellant guilty of the specifications under Article 93 by meticulously excepting certain allegations of the charged misconduct from the specifications. Thus, we are confident that spillover did not occur, and that the appellant's substantial rights were not prejudiced. We find this claim without merit.

Effective Assistance of Counsel

In his third assignment of error, the appellant avers that his counsel was ineffective at trial because he was denied time and access to relevant and necessary evidence. Appellant's Brief at 12. Specifically, the appellant argues that his trial defense counsel was prevented from adequately preparing for trial because: (1) he was denied the ability to view the crime scene by the Staff Judge Advocate and the military judge; (2) he had extreme difficulty in interviewing witnesses; and, (3) the defense was rushed to trial. Appellant's Brief at 9-10. We disagree.

We apply a presumption that counsel provided effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)(citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was

prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004)(quoting *Strickland*, 466 U.S. at 687).

In this case, we do not find any deficiencies in the defense counsel's performance under the *Strickland* standards. To the contrary, trial defense counsel effectively represented the appellant at trial on all charges. The trial defense counsel made numerous successful motions, requested and received a continuance, vigorously cross-examined the witnesses against his client, and put on a strong case of good military character. In addition, he was successful in having several specifications withdrawn, having the members return a finding of not guilty to four specifications, and convincing the members to except out much of the charged misconduct in their findings. We find that the appellant received effective assistance of counsel, and was not deprived of a fair trial. This assignment of error is without merit.³

Sentence Appropriateness

In his fifth assignment of error, the appellant asserts that a bad-conduct discharge is an inappropriately severe sentence. We disagree.

"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 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)). Courts of Criminal Appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395. A sentence should not be disturbed on appeal, "unless the harshness of the sentence is so

³ We have considered the appellant's fourth assignment of error challenging the legal and factual sufficiency of the evidence. Considering the evidence in the light most favorable to the prosecution, we conclude that a reasonable factfinder could have found all the essential elements of violating a lawful general order, four specifications of maltreatment, and assault beyond a reasonable doubt. See *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006)(citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt.

disproportionate as to cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.C.M.R. 1980).

In the present case, the appellant, a squad leader and noncommissioned officer of Marines, was found guilty of violating a general order prohibiting hazing, maltreating his Marines, and assaulting a Marine subordinate. After reviewing the entire record, and taking into consideration the appellant's excellent military record, we find that the adjudged sentence is appropriate for this offender and his offenses. *Healey*, 26 M.J. at 395; *Snelling*, 14 M.J. at 268.

Sentence Disparity

As part of his fifth assignment of error, the appellant contends that his sentence, including a bad-conduct discharge, is highly disparate from the sentences of other Marines who were involved in similar conduct. Appellant's Brief at 16. In support of his claim of sentence disparity, the appellant relies on the results of trial and sentence limitation portions of pretrial agreements of other Marines convicted at Camp Lejeune, North Carolina for hazing, maltreatment, and assault, which were included as part of Defense Exhibit A and the appellant's Clemency Request of 29 August 2004.

As a general rule, sentence comparison is appropriate only in those instances of highly disparate sentences adjudged in closely related cases. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). Closely related cases are those in which "coactors [are] involved in a common crime, servicemembers [are] involved in a common or parallel scheme, or [there is] some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. Cases may also be closely related if the charges are similar in nature and seriousness. *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). If the cases are closely related and the sentences are highly disparate, the disparity must be supported by a rational basis. *Lacy*, 50 M.J. at 288. When a wide disparity exists for reasons without a rational basis, we have the discretion to remedy the problem. *Kelly*, 40 M.J. at 570. The appellant bears the burden of demonstrating that any cases are closely related and that the sentences are highly disparate. *Lacy*, 50 M.J. at 288. The purpose of sentence comparison in closely related cases is to achieve "relative uniformity." *Olinger*, 12 M.J. at 461. Relative uniformity, however, does not mean mathematical equivalency. *Id.*

Applying the criteria set forth in *Kelly* and *Lacy*, we find that the appellant has not met his burden of demonstrating that his case is closely related to that of Corporal (CPL) G, LCpl F, or LCpl Q. The appellant committed his crimes while he was in a forward deployed unit in Guantanamo Bay, Cuba, which is a high profile, mission-critical environment. The other Marines' crimes were committed while they were in garrison at Camp Lejeune. The appellant was the victims' squad leader, entrusted with his victims' care as a noncommissioned officer. We are unable to determine, based on the information provided, that the other Marines were squad leaders, or were in positions of direct or immediate command over their victims. The appellant's course of conduct was not similar in nature and seriousness to those of CPL G, LCPL F and LCPL Q, and did not arise from a common scheme. Unlike the other Marines, the appellant's maltreatment of his subordinates included sexually perverse acts, and his assault consisted of pointing a loaded 9mm pistol at the chest of one his subordinates. Thus, the appellant has failed to carry his initial burden, and therefore further examination of his disparity argument is unnecessary.

However, even assuming, *arguendo*, that the cases are closely related, we find the appellant has failed to show that the sentences adjudged are highly disparate. *Lacy*, 50 M.J. at 288. To the contrary, the sentences adjudged are nearly identical, in that they all included a bad-conduct discharge, a period of confinement, and a reduction in pay grade to E-1.⁴ The fact that CPL G, LCpl F, or LCpl Q had pretrial agreements that required the CA to suspend their punitive discharges is not enough to make the sentences "highly" disparate. "[T]he military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military accused is sentenced as an individual." *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001)(citing *United States v. Taylor*, 991 F.2d 533, 536 (9th Cir. 1993)).

Finally, even if the appellant had satisfied his burden of establishing that the sentences are highly disparate, the record contains sufficient information to support a rational basis for that disparity. The appellant was a squad leader of Marines in

⁴ The appellant was sentenced to a bad-conduct discharge, confinement for three months, hard labor without confinement for three months, and reduction to pay grade E-1. The sentence adjudged to CPL G was a bad-conduct discharge, confinement for 120 days, reduction in pay grade to E-1, and forfeiture of \$500 pay per month for four months. The sentence adjudged LCPL F was a bad-conduct discharge, confinement for 150 days, and reduction in pay grade to E-1. LCPL Q was adjudged a sentence extending to a bad-conduct discharge, confinement for eight months, reduction in pay grade to E-1, and forfeiture of \$795.00 pay per month for eight months.

a mission-critical, forward deployed environment, who seriously abused his authority by hazing and maltreating his subordinates by ordering his subordinates to perform humiliating, degrading, and perverse acts. In addition, he pointed a loaded 9 mm pistol at the chest of one subordinate. Hence, there is a rational basis for the differences in sentences approved by the convening authority in each of the cases. This assignment of error is without merit.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court