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

Before
R.E. VINCENT, E.C. PRICE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CODY J. ECK
MASTER-AT-ARMS SEAMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 200800698
GENERAL COURT-MARTIAL

Sentence Adjudged: 16 May 2008.
Military Judge: CAPT David Bailey, JAGC, USN.
Convening Authority: Commander, Navy Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR M.B. Shaw, JAGC, USN; **Addendum**: LCDR W.A. Record, Jr., JAGC, USN.
For Appellant: LT Gregory Manz, JAGC, USN.
For Appellee: Capt Mark Balfantz, USMC.

16 June 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of conspiracy to commit robbery with a firearm, violation of a lawful general order, two specifications of solicitation to commit robbery with a firearm, and one specification of solicitation to commit a larceny, in violation of Article 81, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. § 881, 892, and 934. The appellant was sentenced to confinement for seven years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved sentence as adjudged.

The appellant raises three assignments of error. In his first assignment of error, the appellant contends that the military judge erred in denying his challenge for cause against (CAPT) O'Regan, U.S. Navy. His second assignment of error alleges that his sentence warrants relief because it is highly disproportionate compared to the sentence of his co-conspirator. His final assignment of error asserts that the CA's action was defective because it failed to mention the appellant's co-conspirator as a companion case.

We have considered the record of trial, the appellant's three assignments of error, and the Government's response. 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.

Challenge for Cause

During group *voir dire*, the military judge asked, "Would any of you give testimony of a law enforcement official such as a master-at-arms or Naval Criminal Investigative Service agent, any higher credibility solely because of the individual's occupation?". Government's 24 Dec 2008 Consent Motion to Attach Documents at 19.[1] CAPT O'Regan responded in the affirmative. *Id.* When he returned for individual *voir* dire, the following dialogue took place:

> TC: Good morning, sir. Judge Bailey asked you a question during the group session about would you tend to give more weight to testimony from an officer or a Master-at-Arms, and you answered that you would. Would you just mind elaborating on what you meant?
>
> CAPT O'Regan: Yes, I just felt that those individuals in the position that hold [sic] and the experience they have in criminal investigation, their weight--or their answers, or responses would or with their position would tend to have additional weight in their responses more so than an individual who's not trained in criminal investigation and procedures.
>
> TC: Now, Captain Bailey also asked if you could keep an open mind regarding the verdict until all the evidence is in

[1] We note the original authenticated record of trial (ROT) did not contain 35 pages of verbatim transcript. The missing pages consisted of the group *voir dire* conducted by the military judge and trial counsel. On 5 and 9 January 2009, we granted the Government's Motions to Attach Documents which contained the missing authenticated pages as well as affidavits from the military judge, court reporter, and trial counsel. The affidavits indicated that the first 33 pages are to be inserted after page 178 of the ROT docketed with the court and further directed that pages 34 and 35 should replace pages 179 and 180 of the docketed ROT.

and you've been instructed on the law. Are you able to do that still, sir?

CAPT O'Regan: Yes.

. . .

TC: . . . Captain Bailey also asked during his preliminary instructions that since you cannot properly make the determination as to the accused's guilt or innocence until you've heard all the evidence and received instructions. It's vital that you can retain an open mind during--until all the evidence has been presented and the instructions have been given to you. Are you still able to follow that instruction, sir? .

CAPT O'Regan: Yes.

TC: And defense counsel asked if Master-at-Arms Seaman Apprentice Eck decides to call witnesses or present evidence on his behalf, will you weigh that evidence just as you would evidence presented by the prosecution, is that still true, sir?

CAPT O'Regan: Yes.

Id. at 185-86.

The appellant's trial defense counsel then asked CAPT O'Regan if "taking into consideration all the questions that you've been asked by the military judge and the prosecution and myself, is there any reason you can think of that you would be unable to be fair and impartial?", and he responded, "No". *Id.* at 191.

The appellant's trial defense counsel challenged CAPT O'Regan based on an implied bias in favor of the Government. *Id.* at 268. He argued that nine NCIS agents and several Master-at-Arms personnel listed as potential Government witnesses was an important factor in considering whether CAPT O'Regan had a bias. Additionally, the trial defense counsel asserted that CAPT O'Regan's prior experience as an installation commander provided him with an opportunity to work closely with base police and acquire extensive knowledge concerning their roles and responsibilities. *Id.* at 268-69.

The military judge noted that, in response to the question about the testimony of law enforcement agents, CAPT O'Regan responded that they were more experienced and "[n]ot necessarily that he found them more credible." *Id.* at 271. He also commented that CAPT O'Regan responded that he would keep an open mind and weigh the defense and prosecution evidence equally. The military judge stated that CAPT O'Regan indicated that, although

he had interacted with security personnel, he did not have much knowledge concerning their training. *Id.*

Addressing actual bias, the military judge noted that he personally observed CAPT O'Regan and listened to his responses. He determined that CAPT O'Regan was forthcoming and candid with his responses. Concerning implied bias, the military judge denied the challenge for cause noting, "I think his [sic] objectively viewing his responses as [sic] his previous experience he seemed to be very even-handed in . . . terms of how he viewed cases to be investigated and disposed of." *Id.* at 272-73.

Standard of Review

A court member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

"R.C.M. 912(f)(1)(N) encompasses 'both actual bias and implied bias.'" *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)(quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)).[2] Accordingly, "military judges are required to test the impartiality of potential panel members on the basis of both actual and implied bias." *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). "Challenges for actual or implied bias are evaluated based on a totality of the circumstances." *Id.* (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004)).

Although they are not separate grounds for a challenge for cause, actual and implied bias are separate tests. *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003). "The test for actual bias is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions'". *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)(quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). Actual bias is a question of fact that tests a challenged member's credibility and demeanor when expressing his views. *See Richardson*, 61 M.J. at 118; *Miles*, 58 M.J. at 195; *Napoleon*, 46 M.J. at 283.

The applicable standard of appellate review of a military judge's challenge for cause decision is "clear abuse of discretion." *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)(citing *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005)). We shall review the test for actual bias

[2] We note the appellant only raised implied bias in his assignment of error. However, in accordance with our Article 66(c), UCMJ, mandate, we will also evaluate actual bias.

subjectively extending the military judge a "high degree of deference on rulings involving actual bias" since we recognize that the military judge was afforded the opportunity to observe the demeanor of the challenged member. *Richardson*, 61 M.J. at 118.

The focus for implied bias is "on the perception or appearance of fairness of the military justice system." *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). Accordingly, implied bias is reviewed through the eyes of the public using an objective-based "standard less deferential than abuse of discretion but more deferential than *de novo*." *Richardson*, 61 M.J. at 118 (citing *Strand*, 59 M.J. at 458). Notwithstanding a member's disclaimer of bias, there is implied bias "'when most people in the same position would be prejudiced.'" *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)(quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985)).

We also recognize that "'military judges must liberally grant challenges for cause.'" *James*, 61 M.J. at 139 (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

Turning first to actual bias, we hold that the military judge did not clearly abuse his discretion in denying the appellant's challenge for cause against CAPT O'Regan. CAPT O'Regan affirmatively responded that he would keep an open mind and would be able to fairly evaluate the testimony of Government and defense witnesses equally. The military judge's statements in the record clearly demonstrate that he made a credibility determination, specifically commenting on CAPT O'Regan's forthright and candid responses. Accordingly, we find no clear abuse of discretion as to actual bias.

Furthermore, we do not believe the perception or appearance of the fairness of the proceedings or the military justice system was negatively impacted by CAPT O'Regan's presence on the panel and, thus, we do not find any implied bias in this case. Additionally, the military judge expressly cited to the liberal grant mandate when he granted the appellant's challenge of cause against CDR [S], a potential member. *Id.* at 268. Therefore, we are confident that he considered it in denying the appellant's challenge for cause against CAPT O'Regan.

Sentence Disparity

In his second assignment of error, the appellant contends that the approved sentence in his case is highly disparate in comparison with the approved sentence of his co-conspirator, Mater-at-Arms Seaman (MASN) Corey L. Galloway, USN. In support of his contention, the appellant notes MASN Galloway was sentenced at a general court-martial to a period of confinement of two years, total forfeitures, reduction to pay-grade E-1 and a bad-conduct discharge. The appellant was sentenced to

confinement for seven years, total forfeitures, reduction to pay-grade E-1, and dishonorable discharge.

This case requires exercise of our unique, highly discretionary authority under Article 66, UCMJ, to determine sentence appropriateness. *See United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). We also recognize our duties under Article 66, UCMJ, to ensure uniformity, even-handedness, and a fair and just punishment for every accused. *United States v. Durant,* 55 M.J. 258, 263 (C.A.A.F. 2001). The CAAF has indicated that "the military system must be prepared to accept some disparity in sentencing of codefendants, provided each military accused is sentenced as an individual." *Id.* at 261.

We are not required to "engage in sentence comparison with 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)). When we compare sentences of co-conspirators, we initially determine if the cases are closely related and, if so, we then determine if the sentences are highly disparate. The appellant bears the burden of demonstrating that the cases are closely related and the sentences highly disparate. *Id.* at 288. The test for determining whether sentences are highly disparate "is not limited to a narrow comparison of the relative numerical values of the sentences at issue, but may also include consideration of the disparity in relation to the potential maximum punishment." *Id.* at 289. If the appellant meets his burden, the burden then shifts to the Government to show a rational basis for the differences. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *Lacy*, 50 M.J. at 288.

The appellant has met the first burden that the two cases are closely related, since he and MASN Galloway were co-conspirators involved in a common crime. We next consider whether the appellant has met his burden of demonstrating that the sentences are highly disparate.

The appellant was convicted of two specifications of solicitation to commit robbery with a firearm, and one specification of solicitation to commit a larceny, while MASN Galloway was only convicted of two specifications of solicitation to commit robbery. Also, the appellant was facing a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, 32 years confinement and reduction to pay grade E-1. MASN Galloway was facing a maximum punishment of a dishonorable discharge forfeiture of all pay and allowances, 27 and 1/2 years confinement, and reduction to pay grade E-1.

We conclude that the appellant has failed to meet his second burden of demonstrating that his sentence and MASN Galloway's sentence are "highly disparate". First, he was convicted of one

more solicitation offense than was MASN Galloway. Second, the appellant was sentenced to a confinement period less than one-fourth of the maximum allowable. We note that there is a much greater disparity between the appellant's sentence and the potential maximum punishment as compared to the disparity between his sentence and MASN Galloway's sentence. *Id.*

Assuming, without deciding, that the appellant established that the sentences were highly disparate, there is a rational basis for the differences in the respective sentences. Most significantly, the appellant was the primary actor in the conspiracy to commit robbery with a firearm. *See United States v. Rodriguez*, 57 M.J. 765, 774 (N.M.Ct.Crim.App. 2002), *aff'd,* 60 M.J. 239 (C.A.A.F. 2004). The appellant violated Article 1159, U.S. Navy Regulations by actually possessing a shotgun onboard Naval Base Norfolk; whereas MASN Galloway was guilty as a conspirator. The appellant physically possessed the shotgun, ski mask, camera, and cell phone in his motor vehicle in the movie theatre parking lot, which was the overt act undertaken for the purpose of bringing about the object of the conspiracy to commit robbery with a firearm. The appellant was also the conspirator who personally approached Seaman (SN) [J] and Construction Mechanic Third Class [W] and solicited them to commit robbery with a firearm and subsequently solicited SN [J] to commit a separate larceny. Finally, MASN Galloway is credited for pleading guilty at his court-martial. *Id.*

We specifically find that the sentence in this case is appropriate for this offender and his offenses. *Baier*, 60 M.J. at 382; *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

CA's Failure to Mention Companion Case

The CA's failure to mention the case of MASN Galloway in his action "does not render the action fatally defective." *United States v. Bruce*, 60 M.J. 636, 642 (N.M.Ct.Crim.App. 2004). Although the Manual of the Judge Advocate General contains an administrative requirement to cite a companion case in a CA's action,[3] we have previously held that this is not a substantive right. *Id.* Additionally, even if the JAGMAN established a substantive right for the appellant, he has failed to demonstrate any prejudice. Since we have concluded that the appellant's sentence is not highly disparate from that of MASN Galloway, the appellant was not harmed by the CA's failure to note MASN Galloway's case.

[3] Manual of the Judge Advocate General, Judge Advocate General's Instruction 5800.7D § 0151a(2) (15 Mar 2004).

Conclusion

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

Judge PRICE and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court