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

Before
E.E. GEISER, E.C. PRICE, M.W. PEDERSEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SEAN B. JANSEN
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200900248
GENERAL COURT-MARTIAL

Sentence Adjudged: 2 December 2008.
Military Judge: LtCol T.J. Sanzi, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj K.C. Harris, USMC.
For Appellant: LT Michael E. Maffei, JAGC, USN.
For Appellee: CDR Kimberly D. Hinson, JAGC, USN; Maj Elizabeth A. Harvey, USMC.

22 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy to distribute cocaine, introduction of cocaine, four specifications of distribution of cocaine, and two specifications of distribution of oxycodone, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The convening authority (CA) approved the adjudged sentence of

confinement for seven years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. Pursuant to a pretrial agreement, the CA suspended confinement in excess of 42 months.

Before us, the appellant asserts that his sentence is highly disproportionate when compared to the sentence of his co-conspirator.[1] After carefully considering the parties' briefs and the record of trial, we are convinced 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 occurred. Arts. 59 (a) and 66 (c), UCMJ.

Sentence Disparity

The appellant bears the burden of establishing that a comparison case is "closely related" to his and that the sentence is "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). In his post-trial clemency submission, the appellant invited the CA's attention to the case of his co-conspirator, Lance Corporal (LCpl) James C. Bryson, USMC, which he claimed supported his argument that his own sentence was unduly harsh. He raises the same issue before us and, although the Government concedes, and we agree, that the co-conspirator's case is "closely related" to the appellant's, we conclude that the sentences are not "highly disparate." *Lacy*, 50 M.J. at 288.

LCpl Bryson pleaded guilty to conspiracy with the appellant to distribute controlled substances and to twelve specifications of introduction or distribution of controlled substances. His sentence included five years of confinement, and the CA suspended confinement in excess of 12 months pursuant to a pretrial agreement. During the fall of 2007, the appellant and LCpl Bryson conspired to distribute cocaine, combined their funds, rode in the appellant's vehicle and purchased cocaine from a civilian source, transported the cocaine on to Camp Pendleton, where they distributed the cocaine and other drugs to other Marines. Prosecution Exhibit 1. Apparently, only the appellant dealt directly with the civilian source of those drugs. *Id*.

The appellant argues that his sentence is highly disparate as he will serve 3.5 times the confinement of his co-conspirator, LCpl Bryson, and that his adjudged confinement was 1.4 times that of his co-conspirator's.

[1] This assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

In *Lacy*, the Court of Appeals for the Armed Forces focused on sentence disparity in relation to the maximum authorized sentence, stating: "[t]he test in such a case is not limited to a narrow comparison of the relative numerical values of the sentences at issue, but also may include consideration of the disparity in relation to the potential maximum punishment." *Id*. at 289.

The appellant concedes that LCpl Bryson's maximum authorized sentence included 150 years confinement and that his own included 120 years confinement. Thus, LCpl Bryson's adjudged confinement was 3.3% of the authorized maximum, and the appellant's was 5.8% of his. Neither adjudged sentence, therefore, was severe when compared to the authorized maximum. As we have previously observed, "[t]he sentence differences are well within the range of what one would expect that different general courts-martial, in carrying out their obligation to determine an appropriate sentence based on an evaluation of the offense(s) and the offender, might reach. Trial Courts and appellate courts cannot hope to achieve a perfect equivalence." *United States v. Fee*, 1997 CCA Lexis 656, *3, unpublished op. (N.M.Ct.Crim.App. 8 Dec 1997), *aff'd,* 50 M.J. 290 (C.A.A.F. 1999). We are left to conclude the sentences are not “highly disparate.” *Lacy*, 50 M.J. at 288.

Therefore, we need not consider the sentence on the basis of any perceived disparity. At any rate, the CA was free to extend clemency to the appellant yet refrained from doing so. Our court does not have clemency granting authority, and therefore our only consideration is whether an otherwise legal sentence should be affirmed. *See United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988).

Having reviewed the evidence in aggravation and the extensive evidence in extenuation and mitigation, in the context of the offenses of which the appellant was convicted, we are independently satisfied that the sentence announced by the military judge and approved by the CA is appropriate for this offender and for his offenses. *See United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We see no basis to alter the sentence under Article 66(c), UCMJ.

Conclusion

The findings and the approved the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court