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

Before
D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JARVIS D. RAYNOR
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS

NMCCA 200800621
GENERAL COURT-MARTIAL

Sentence Adjudged: 21 May 2008.
Military Judge: Maj Charles Hale, USMC.
Convening Authority: Commanding General, 3d Marine Logistics Group, Marine Corps Air Station, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Maj D.A. Winklosky, USMC.
For Appellant: LCDR Derek Hampton, JAGC, USN.
For Appellee: LCDR I.K. Thornhill, JAGC, USN; Capt Geoffrey S. Shows, USMC.

26 February 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of conspiracy, three specifications of violating a lawful general order, indecent sexual conduct, larceny, and adultery, in violation of Articles 81, 92, 120, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 920, 921, and 934. The appellant was sentenced to 600 days confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 18 months pursuant to the terms of a pretrial agreement.

After carefully considering the record of trial, the appellant's assignment 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 appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

The appellant's sole assignment of error alleges that his approved sentence of confinement for 600 days is inappropriately severe when compared to the terms of confinement approved in the cases of his co-accused, Gunnery Sergeant Carl M. Anderson, Sergeant Lanaeus J. Braswell, and Lance Corporal Larry A. Dean, Jr. We disagree.

The appellant and the co-accused were assigned to the same unit aboard Marine Corps Air Station Iwakuni, Japan. At approximately 2230 on the evening of 13 October 2007, the four Marines traveled off base to frequent bars in nearby Hiroshima to celebrate Gunnery Sergeant Anderson's upcoming retirement and departure from Japan. At the time, the appellant knew that Sergeant Braswell held a red liberty card, which meant that he was required to return to base no later than 2400. The appellant also allowed his co-accused to drink beer while they were passengers in his van on the trip to Hiroshima, in violation of a lawful general order.

After arriving in Hiroshima at approximately 0030 on 14 October 2007, the appellant and his co-accuseds visited a bar known as "Club Chinatown." Sergeant Braswell became acquainted with a 19-year-old woman, a Japanese national, and the two left the bar and participated in sexual intercourse in the back seat of the appellant's van. The appellant and the other two co-accused also left the bar, and watched through the window of the van while Sergeant Braswell and the woman had sex. After noticing that other bar patrons were also watching Sergeant Braswell's activities in the van, the appellant and the other co-accused got into the van and drove away.

While the appellant was driving away, Sergeant Braswell remarked "We could all hit this," meaning that the other co-accused could have sex with the woman. Lance Corporal Dean said "Hell yeah, let's go" to which the appellant responded by driving to a secluded parking lot next to an apartment building. The appellant and his co-accused took turns having sexual contact with the woman; the appellant admitted to placing a condom on his penis then touching it to the woman's labia. Prosecution Exhibit 1 at 9. After the woman got out of his van to put her clothes back on, the appellant noticed her wallet, cell phone, and yen notes lying on the floor of the van. Knowing the yen notes belonged to the woman, the appellant stole her money (approximately $111.00), then drove away leaving the woman alone in the parking lot. On their way out of town, the appellant stopped by a beauty salon owned by a girlfriend of his. The appellant had sexual intercourse with his girlfriend inside the beauty salon while his co-accused waited in his car outside. At

the time of his offenses, the appellant was married to another Gunnery Sergeant who was at their home in Iwakuni, pregnant with twins.

Sentence Disparity

The appellant bears the burden of demonstrating that cases are closely related and that the sentences are highly disparate. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). To be closely related, "cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). Where this court finds sentences to be highly disparate in closely related cases, it must determine whether there is a rational basis for the differences between the sentences. *United State v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). A disparity between the sentences in closely related cases will warrant relief when it is so great as to "exceed 'relative uniformity,'" or when it rises to the level of an "'obvious miscarriage of justice or an abuse of discretion.'" *United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995)(quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)).

The Government apparently concedes, and we find, that the cases of Gunnery Sergeant Anderson, Sergeant Braswell, and Lance Corporal Dean are closely related to the appellant's case. However, based upon our review of the record, we find that the appellant has not met his burden in demonstrating that his sentence is highly disparate when compared with those of his co-accused.

"Sentence comparison does not require sentence equation." *Durant,* 55 M.J. at 260 (citations omitted). The test 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. *Lacy,* 50 M.J. at 289. By exercising our authority to determine sentence appropriateness under Article 66(c), UCMJ, the goal is "to attain *relative* uniformity rather than an arithmetically average sentence." *Id.* at 288 (quoting *Olinger,* 12 M.J. at 461) (emphasis in original).

At the outset, we note that the adjudged sentence for the appellant included 600 days confinement, reduction to pay grade E-1, and a bad-conduct discharge. Even if we were to accept as fact that his co-accused were each adjudged terms of confinement less than the appellant, this is not persuasive that his sentence is unfairly disparate when compared to theirs.[1]

[1] The only reference in the record to the courts-martial of the appellant's co-accused is an acknowledgement in the convening authority's action. The appellant's brief states that Gunnery Sergeant Anderson received 15 months confinement, while Sergeant Braswell and Lance Corporal Dean each received 12

While there might well be some difference between the appellant's term of confinement and those of his co-accused, we do not consider them to be "highly disparate."[2] As our superior court has observed, "the military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military accused is sentenced as an individual." *Durant,* 55 M.J. at 261 (citations omitted).

Considering the facts and circumstances of each case, we find that a rational basis exists for any disparity. *United States v. Sothen,* 54 M.J. 294, 296 (C.A.A.F. 2001)(citing *Lacy,* 50 M.J. at 288). While the appellant plead guilty to similar offenses to those of his co-accused, he also pled to the additional offenses of larceny of the victim's money, and adultery with his girlfriend in the beauty salon. We also note that the appellant was the designated driver for this escapade, and it was his vehicle that was used to facilitate all four Marines having sexual contact with the victim. The appellant's guilty plea to fraternization reflects his responsibility as a staff noncommissioned officer to be a leader who upholds the law, rather than a follower who assists junior Marines in efforts to break it. If ever a case presented conduct that is both service discrediting and prejudicial to good order and discipline in the armed forces, this one does.

Assuming that the co-accused were in fact sentenced consistent with the averments of counsel in their briefs, the appellant has not met his burden of showing that his sentence is highly disparate to the sentences in the companion cases, and the record provides good and cogent reasons for any disparity that does exist.[3] We conclude that the sentence approved by the convening authority is appropriate for this offender and his offenses, and decline to grant relief. *United States v. Baier,* 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982).

Conclusion

After reviewing the entire record, we conclude that the sentence is not highly disparate and is appropriate for this

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months confinement, and all were reduced to pay grade E-1, and received bad-conduct discharges from the service. Appellant's Brief and Assignment of Error of 20 Oct 2009 at 3. However, there are no affidavits or other facts in the record regarding these sentences.

[2] The appellant's assigned error alleges his sentence as approved is disparate when compared to those of his co-accused. His brief, however, focuses on the period of confinement ordered executed after the application of the sentence limitation portion of the pretrial agreement. Since we find his sentence as approved is not disparate, we implicitly find a lesser portion of that sentence is likewise not disparate.

[3] Averments of counsel are not evidence. The better practice is to supplement the record with affidavits, declarations, or documents. *See* Rule 4-7.3 of the Court's Rules of Practice and Procedure.

offender and his offenses. Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

Chief Judge O'TOOLE and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court