

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

**Before
L.T. BOOKER, E.C. PRICE, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ERIC L. SPARKS
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200900670
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 23 July 2009.

Military Judge: Col Daniel Daugherty, USMC.

Convening Authority: Commanding Officer, Wounded Warrior
Battalion-East, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: LtCol S.C. Newman,
USMC.

For Appellant: CAPT Frederic Matthews, JAGC, USN.

For Appellee: LCDR Clayton Trivett, JAGC, USN; LT Timothy
Delgado, JAGC, USN.

22 April 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of wrongful use of cocaine and one specification of larceny, violations respectively of Articles 112a and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 921. The appellant was sentenced to confinement for eight months, reduction to pay grade E-1, and a bad-conduct discharge.¹

¹ The military judge recommended that the bad-conduct discharge and all confinement in excess of 75 days be suspended. Record at 173.

Pursuant to a pretrial agreement, the convening authority (CA) disapproved all confinement and otherwise approved the sentence as adjudged.

We have carefully reviewed the record of trial, the appellant's brief and assignment of error asserting that his sentence was inappropriately severe, and the Government's answer. 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.

Sentence Severity

This is a sad case that enforces the harsh reality and consequences of war. The appellant served two tours of duty in Iraq. On 17 September 2006, during his second tour, he took decisive action after his unit came under attack from small arms fire, thereby allowing the members of his unit to accomplish their mission unscathed. Four days later, on 21 September 2006, the HMMWV the appellant was riding in hit an improvised explosive device (IED). The IED blast blew the vehicle door into the appellant's leg, resulting in fractures of his tibia and fibula and subsequent complications that led to his addiction to painkilling medication. The concussive effect of the blast impaired the appellant's short-term cognitive functioning and impulse control.

We have great respect for the appellant's combat valor and service to his country which has left him in a condition that is not, and likely never will be, the same as before he went to war; however, "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). It is not the same as clemency, which is the sole province of the CA. *Id.* at 396. Assessing sentence appropriateness 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)).

The offenses for which the appellant stands convicted are serious. He stole Percocet pills from another Marine, Lance Corporal (LCpl) H, who was recovering from skin grafts. As a result, the battalion was locked down and LCpl H was forced to undergo urinalysis and blood draws to ensure that he had not ingested the pills, and it appears that LCpl H was forced to deal with his pain without pain medication for that day. Record at 126-27. The appellant's cocaine use occurred during a day of drinking, and was for recreational purposes only -- there was, by his admission, no medicinal purpose to it. *Id.* at 106-07. We also note that the evidence of record indicates that the

appellant understood and appreciated the wrongfulness of his conduct. *Id.* at 90; Appellate Exhibit X.

We recognize that a bad-conduct discharge is a severe punishment, especially when considering the appellant's valor in combat and the severe injuries he has suffered as a result. However, we are satisfied that the appellant's entire sentence is appropriate for him and for his offenses, and we will not invade the province of the CA by exercising any sort of clemency in this case. See *Healy*, 26 M.J. at 396.

We note that the CA erred when he purported to execute the bad-conduct discharge. CA's Action of 10 Nov 2009 at 2. The CA had no authority to order the punitive discharge into execution until the completion of appellate review. RULE FOR COURTS-MARTIAL 1113 (c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Thus, that portion of his action is a nullity. *United States v. McGee*, 30 M.J. 1086, 1088 (N.M.C.M.R. 1989). However, as the appellant has not alleged any prejudice arising from this error, we decline to grant relief.

We further note that the court-martial order reflects the appellant was found not guilty of possession of Percocet, distribution of Percocet, and use of Benzodiazepine. In fact, these offenses were withdrawn. Record at 117. The appellant is entitled to have "his official records correctly reflect the result of" his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We therefore direct that the supplemental court-martial order reflect that Charge I and its two underlying specifications and Specification 2 of the Additional Charge were withdrawn.

Conclusion

The findings and sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court