

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

**Before
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ERICK L. OCHOA
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100403
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 26 April 2011.

Military Judge: LtCol Peter S. Rubin, USMC.

Convening Authority: Commanding Officer, Headquarters
Battalion, Marine Air Ground Task Force Training Command,
Marine Corps Air Ground Combat Center, Twentynine Palms,
CA.

Staff Judge Advocate's Recommendation: LtCol A.G. Peterson,
USMC.

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: Capt David N. Roberts, USMC.

20 December 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of conspiracy to commit larceny, three specifications of theft of military property, and three specifications of fraud against the United States in violation of Articles 81, 121, and 132, Uniform Code of Military Justice,

10 U.S.C. §§ 881, 921, and 932. The appellant was sentenced to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, in accordance with the pretrial agreement, suspended all confinement in excess of 120 days.

The appellant argues first that the military judge abused his discretion in not allowing him to introduce evidence in mitigation concerning the sentences and punishments awarded to his co-conspirators. Secondly, the appellant argues that his sentence is disproportionately harsh relative to those of his co-conspirators. We disagree and find that no error materially prejudicial to a substantial right of the appellant occurred. We therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

Background

While serving as a travel clerk at the Installation Personnel Administration Center (IPAC), the appellant was approached by another clerk, Lance Corporal (LCpl) Godinez, who suggested that they submit a fraudulent travel claim in the appellant's name. Record at 52-53. The appellant secured a fraudulent hotel receipt from another clerk, LCpl Solis, and signed and submitted a false claim for Temporary Lodging Expenses (TLE) prepared by LCpl Godinez. After receiving payment on the claim, the appellant paid LCpl Godinez and LCpl Solis for their part in the scheme. *Id.* at 56. Soon thereafter, the appellant approached two other Marines, LCpl Ortega and LCpl Lopez, proposed the same scheme to them, and ultimately processed a fraudulent travel claim for each of them. In return, both Marines gave him a part of the fraudulent claim payment when it was deposited in their pay accounts. *Id.* at 72, 79.

Evidence of Co-Conspirators' Punishment

At a pretrial motion hearing, the military judge granted the Government's motion *in limine* to suppress evidence that two of the co-conspirators had been awarded nonjudicial punishment rather than taken to court-martial. The appellant asserts that the military judge abused his discretion in excluding this evidence from consideration in the sentencing hearing. We disagree. The law on the issue of a co-conspirator's sentence is well-settled: that sentence is not a proper consideration at trial level. *United States v. Hutchinson*, 15 M.J. 1056, 1063 (N.M.C.M.R. 1983), *sentence rev'd on other grounds*, 18 M.J. 281

(C.M.A. 1984). Similarly, the disposition of a co-conspirator's charges at nonjudicial punishment vice a court-martial is not a proper consideration at the trial level.

Sentence Disparity

The appellant also asserts that his sentence was disproportionately severe compared to that received by others involved in the same travel fraud scheme. Appellant's Brief of 16 Sep 2011 at 10. The record of trial and clemency request indicate that these charges arose from an investigation that ultimately implicated as many as 29 Marines assigned to IPAC in a widespread travel claim fraud scheme. Of those Marines, twenty were offered nonjudicial punishment; the five considered most culpable were referred to special courts-martial. Record at 13-14; Clemency Request of 25 Jul 2011, Enclosure 1 at 1. At least one Marine transferred prior to disposition of his case by IPAC. AE VI at 1-2; Clemency Request of 25 Jul 2011 at 2. Both at trial and before this court, the appellant focuses on the cases of the four Marines with whom he conspired: LCpl Godinez, who first approached him and proposed the scheme; LCpl Solis, who supplied the fraudulent hotel receipt; and LCpl Ortega and LCpl Lopez, whom the appellant subsequently recruited to file false claims under their own names, with kickbacks to himself and LCpl Solis. Appellant's Brief at 10-13.

The appellant does not assert sentence disparity between himself and LCpl Solis, who faced drug charges in addition to claim fraud charges and received a more severe sentence. *Id.* at 12; SJAR of 6 Jul 2011, Encl 4. Instead, the appellant focuses on LCpl Ortega and LCpl Lopez, whose cases were disposed of with nonjudicial punishment, and LCpl Godinez, who transferred prior to adjudication of the cases. Appellant's Brief at 3. The record, however, is devoid of evidence on the ultimate disposition of LCpl Godinez's case.

In his assertion of sentence disparity, the appellant relies on the analysis established in *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999), arguing that his case is "closely related" to those of LCpl Lopez and LCpl Ortega and that the sentences are "highly disparate." Appellant's Brief at 10-12.

We note, however, that the sentence disparity analysis established in *Lacy* applies only to court-martial cases: the issue of sentence uniformity is not presented when there is no court-martial record of findings and sentence that can be compared to the appellant's case. *United States v. Noble*, 50

M.J. 293, 294-95 (C.A.A.F. 1999). Since the record is devoid of any information concerning the outcome of any court-martial other than LCpl Solis's, whose case appellant argues is not closely-related, we cannot engage in the sentence comparison urged by the appellant.

Nevertheless, the appellant's claim does raise the issue of differences in initial disposition of co-accused, an issue that can be viewed by this court in determining sentence appropriateness under Article 66(c), Uniform Code of Military Justice. *Noble*, 50 M.J. at 295. We find the nonjudicial disposition of LCpl Lopez's and LCpl Ortega's charges to be closely related to the appellant's case. Both of these Marines were directly involved in some of the frauds for which the appellant was sentenced. When cases are closely related, yet result in widely disparate dispositions, we must decide whether the disparity results from good and cogent reasons. *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994).

Here we find good and cogent reasons for the disparity in the disposition of the cases. The appellant committed two separate conspiracies and on three separate occasions submitted fraudulent travel claims, defrauding the United States of approximately \$3,100.00. Moreover, he recruited other Marines into this fraudulent scheme, and received kickbacks from them. In contrast, LCpl Lopez and LCpl Ortega were recruited by the appellant, and each was involved only in a subset of the crimes for which the appellant was sentenced.

Considering the entire record, we find that these factors provide a rational basis for the disparity in disposition and in no way detract "from the appearance of fairness or integrity in military justice proceedings." *Kelly*, 40 M.J. at 570. We find no evidence of "discriminatory or otherwise illegal prosecution or referral." *United States v. Stotler*, 55 M.J. 610, 612 (N.M.Ct.Crim.App. 2001). Finding no reason to question the decisions by the convening authority on the disposition of these cases, we decline to grant relief.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court