

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

**Before
J.A. FISCHER, D.C. KING, T.H. CAMPBELL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROBERT D. BOSHELL
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201500210
GENERAL COURT-MARTIAL**

Sentence Adjudged: 20 Feb 2015.

Military Judge: Col M.B. Richardson, USMC.

Convening Authority: Commanding General, 3d Marine Aircraft Wing, San Diego, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.

For Appellant: LCDR Dillon Ambrose, JAGC, USN.

For Appellee: LT James M. Belforti, JAGC, USN; LT Robert J. Miller, JAGC, USN.

30 November 2015

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 general court-martial convicted the appellant, pursuant to his pleas, of conspiracy to distribute lysergic acid diethylamide (LSD), violating a lawful general order by possessing drug paraphernalia, wrongfully using LSD and 3,4-methylenedioxy-methamphetamine ("Ecstasy"), and wrongfully distributing LSD in violation of Articles 81, 92, and

112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892 and 912a.¹ The appellant was sentenced to confinement for four years, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, and suspended confinement in excess of 36 months in accordance with a pretrial agreement.

The appellant argues his confinement sentence was highly disparate in relation to companion cases. He asks this court to affirm no more than two years of confinement. After carefully considering the record of trial and the parties' submissions, we conclude the findings and sentence are correct in law and fact, and there is no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant began Ecstasy use while attending "rave" parties. Once he developed an Ecstasy tolerance, he began using LSD. Through the rave scene, he also met Lance Corporal (LCpl) From, who became his roommate at an off-base residence. The two conspired to purchase large amounts of LSD from the appellant's civilian supplier and sell it to support their own drug use and nightclub/rave scene participation. During a temporary marksmanship coaching assignment, the appellant discussed his lifestyle with a fellow coach, LCpl Schafer, who joined the LSD distribution conspiracy. The appellant regularly sold LSD to approximately 10 Marines. One buyer was Corporal (Cpl) Grissom, whom the appellant knew, in turn, distributed to other Marines. Around 40, primarily aviation community, Marines were involved in the appellant's direct and derivative sales.

Law enforcement began unraveling the appellant's endeavors when a Marine tested positive for drugs and identified LCpl From as his source. Investigators analyzed LCpl From's phone and learned about LCpl Schafer's involvement. LCpl From did not implicate the appellant during his interrogation and subsequent cooperation in the investigation. Instead, it was LCpl Schafer who informed investigators that the appellant was also selling LSD with LCpl From, and as the case agent testified, that "[LCpl] From had actually told [the appellant] that he was working as an informant for NCIS [Naval Criminal Investigative Service] and was going to kind of lead them away from him and

¹ The military judge found conspiracy to distribute LSD, distributing LSD, and possessing LSD to be an unreasonable multiplication of charges. After findings, he conditionally dismissed the possession offense (Specification 4 of Charge III) pending final appellate review. Record at 106-08.

[the appellant's] dealings."² The scheme ended when LCpl From authorized NCIS to search his room at their residence. The appellant was home when investigators arrived and cooperated in their search. He later became an NCIS confidential informant and a compensated "mercenary informant" for local civilian law enforcement before his trial.³

Although the appellant's court-martial was first, his co-conspirators' cases went to trial before the CA took action on his adjudged sentence. The CA identified LCpl From, LCpl Schafer, and Cpl Grissom's courts-martial as companion cases considered for sentencing parity purposes before taking action.

LCpl From was convicted on 26 February 2015 at a general court-martial, pursuant to his pleas, of conspiracy to distribute LSD; violating a lawful general regulation by possessing drug paraphernalia; making a false official statement to NCIS, "I am positive Boshell doesn't use drugs;" wrongfully using Ecstasy and LSD; and wrongfully distributing Ecstasy and LSD. He was sentenced to confinement for 36 months, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. The CA suspended confinement in excess of 24 months pursuant to a pretrial agreement with LCpl From.

LCpl Schafer was convicted on 14 April 2015 at a general court-martial, pursuant to his pleas, of two specifications—conspiracy under Article 81 and wrongful LSD use under Article 112a. The LSD distribution conspiracy conviction's overt act is LCpl Schafer providing the appellant money for their LSD supply. He was sentenced to confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge.

Cpl Grissom was convicted on 12 March 2015 at a general court-martial, pursuant to his pleas, of conspiracy to possess LSD with LCpl D.O., wrongfully possessing LSD, wrongfully using LSD, and wrongfully introducing LSD with intent to distribute. He was sentenced to confinement for two years, reduction to pay grade E-1, total forfeitures, and a dishonorable discharge. The CA suspended confinement in excess of 18 months pursuant to a pretrial agreement with Cpl Grissom.

² Record at 122.

³ Record at 130-31.

Discussion

We review sentence appropriateness *de novo*. *United States v. Lane*, 64 M.J. 1,2 (C.A.A.F. 2006). When arguing for relief based on sentence disparity as part of the exercise of our unique, highly discretionary authority to determine sentence appropriateness under Article 66, UCMJ, the appellant must demonstrate "that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" If appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999). "Closely related" cases are those involving "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); *see also Lacy*, 50 M.J. at 288 (citing examples of closely related cases as including co-actors in a common crime, service members involved in a common or parallel scheme, or "some other direct nexus between the servicemembers whose sentences are sought to be compared"). However, co-conspirators are not entitled to equal sentences. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). In determining whether cases are highly disparate, our analysis 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*, 55 M.J. at 289.

Assuming, without deciding, that these four cases are all closely related, the appellant's sentence is not highly disparate considering the punitive exposures at trial. As in *Lacy*, "[t]he sentences at issue in the present appeal . . . are all relatively short compared to the maximum confinement . . . that appellant was facing." *Id.* The maximum sentence for the appellant's convictions included 32 years of confinement.⁴ The differences in the adjudged confinement were all considerably less than the maximum, and they did not produce highly disparate sentences.

Even if, as the appellant suggests, there were highly disparate sentences, we find a rational basis for any sentence disparity. The appellant was more culpable. Relying on a

⁴ The appellant was advised the maximum sentence for the offenses to which he plead guilty included 47 years of confinement (Record at 20), before the military judge conditionally dismissed a 15 year offense at findings. LCpl From's convictions carried a possible 62 years of confinement, LCpl Shafer faced 20 years, and Cpl Grissom faced 40 years.

relationship he had previously established with a civilian drug dealer, the appellant made all the LSD purchases on his and LCpl From's behalf. He introduced LCpl Schafer to LSD and convinced LCpl Schafer to join the scheme. The appellant kept all their LSD in a container under his bed—along with related cash and drug paraphernalia. The appellant encouraged various Marines to purchase and use LSD by insisting urinalysis examinations would not detect their use. And he knew some LSD he sold was being resold to more Marines aboard Marine Corps Air Station Miramar.

Although not specifically raised by the parties, we are further convinced that the appellant's individual sentence was appropriate. As an aviation mechanic and firing range coach, he exercised significant safety responsibilities that could be compromised by his own drug use and drug sales to others in the aviation maintenance and marksmanship communities. Sentencing evidence revealed the appellant's significant adverse impact on his squadron's operations, mission readiness and morale.

The case facts are sufficiently different to explain and justify the different sentences, and also sufficient to demonstrate the appropriateness of the appellant's sentence.

Conclusion

The findings and the sentence as approved by the CA are affirmed. The conditional dismissal of Specification 4 under Charge III shall ripen to a full dismissal when direct review becomes final pursuant to Article 71(c), UCMJ, provided the conspiracy and distribution convictions are not set aside during any subsequent appellate review. See *United States v. Britton*, 47 M.J. 195, 204 (C.A.A.F. 1997) (Effron, J., concurring), *overruled in part on other grounds by United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009).

For the Court

R.H. TROIDL
Clerk of Court

