United States Navy-Marine Corps Court of Criminal Appeals

UNITED STATES
Appellee

v.

Keaton J. McCASLAND
Lance Corporal (E-3), U.S. Marine Corps
Appellant

No. 201700314

Appeal from the United States Navy-Marine Corps Trial Judiciary.

Decided: 23 April 2019.

Military Judge:
Colonel Peter S. Rubin, USMC (arraignment);
Lieutenant Colonel Keith A. Parrella, USMC (trial).

Sentence adjudged 26 June 2017 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of a military judge sitting alone. Sentence approved by convening authority: reduction to E-1, confinement for 44 months, and a dishonorable discharge.[1]

For Appellant:
Lieutenant Commander Ryan C. Mattina, JAGC, USN.

For Appellee:
Lieutenant Commander Ian Maclean, JAGC, USN;
Captain Sean M. Monks, USMC;
Lieutenant Kimberly Rios, JAGC, USN.

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[1] Although the appellant pleaded guilty pursuant to a pre-trial agreement, the agreement had no effect on the sentence, which the convening authority approved as adjudged.

Before HUTCHISON, TANG, and LAWRENCE,
Appellate Military Judges.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of 5 specifications of conspiracy, 1 specification of damage to military property, 15 specifications of larceny, 2 specifications of housebreaking, and 1 specification of unlawful entry in violation of Articles 81, 108, 121, 130, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 908, 921, 930, 934 (2016).

The appellant asserts two assignments of error (AOEs): (1) several specifications constituted an unreasonable multiplication of charges and (2) the appellant's sentence is inappropriately severe and disproportionate when compared to the sentence of his co-conspirator.[2]

I. BACKGROUND

The appellant and Lance Corporal (LCpl) Grasty entered into multiple conspiracies between 1 March 2016 and 31 August 2016. They drove around the parking lots of several military installations, looking at other Marines' personal vehicles in search of items to steal. They stole several items from within the Marines' parked vehicles and removed accessories installed on those vehicles. They stole items such as LED lights, light bars, a truck winch, a speaker box, and a cell phone. They intended to install the items on their own vehicles, to keep the items for their personal use, or to sell them to others.

They also engaged in several other conspiracies to steal from on-base government lots and buildings. On each occasion, they broke into these facilities in the late evening hours, at or around midnight. They variously climbed over fencing, cut through the fencing, or used a key to unlock the property. Once inside the secured areas, they stole military property, including a truck

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[2] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

winch, Logistics Vehicle System Replacement (LVSR) tactical vehicle lights and accessories, vehicle tires, mechanics' tool kits, multi-meters, and Enhanced Small Arms Protective Inserts (ESAPIs). The appellant stated that they intended to install the items on their own personal vehicles, to keep the items for their personal use, or to sell them to others.

The appellant carried out his final conspiracy and theft with LCpl Grasty on or about 13 October 2016. The two men answered an advertisement in which a local Jacksonville, North Carolina, civilian man listed his personally-owned vehicle for sale. The appellant and LCpl Grasty met the owner to inspect the vehicle and to take measurements of the bumpers. They decided not to purchase the vehicle. Instead, they decided to return to the seller's apartment building and steal parts of the vehicle. They found the seller's vehicle in the parking lot, and the appellant waited in the driver's seat of LCpl Grasty's personal vehicle while LCpl Grasty unbolted the bumpers and stole other items from the civilian's vehicle. LCpl Grasty put the stolen items in his own vehicle, and the appellant drove them away. They intended that LCpl Grasty would either keep these items to attach to his own personal vehicle, use them personally, or sell them to others.

The appellant pleaded guilty to three additional larceny offenses, admitting: (1) that he stole a car trailer and coupler from a vehicle parked in the parking lot of his barracks; (2) that he stole $100 by false pretenses by pretending he was the rightful owner of the stolen car trailer when he sold it to a fellow Marine; and (3) that he stole two rings from his co-conspirator, LCpl Grasty. In all, the appellant admitted that he stole over $28,000 worth of personal and military property.[3]

Additional facts necessary to resolve the AOEs are recited below.

II. DISCUSSION

A. Unreasonable Multiplication of Charges

The appellant argues for the first time on appeal that Charge II and its Specification; Charge V, Specifications 1 and 2; and Charge VI and its Specification constitute an unreasonable multiplication of charges (UMC).[4] In

[3] Prosecution Exhibit 1.

[4] Although the appellant styled his AOE as contesting that these charges alleging damaging military property, housebreaking, and unlawful entry constitute UMC, the appellant's brief indicates that he is really arguing that those specifications consti-

Charge II, the appellant pleaded guilty to damaging military property by cutting a chain-link fence.[5] In Charge V, Specifications 1 and 2, the appellant pleaded guilty to housebreaking for entering the 3d Marine Raider Battalion motor pool and, on a separate occasion, the II MEF Headquarters motor transportation facility, respectively, with the intent of committing larceny. In Charge VI, the appellant pleaded guilty to unlawfully entering the Administrative Storage Program vehicle lot. Specifically, he argues that these offenses were the means by which he gained access to the places where he committed the underlying larceny offenses,[6] and therefore they constitute UMC with the affiliated larceny offenses.

Because the appellant entered unconditional guilty pleas and did not raise any UMC objection at trial, his claim is waived.[7] *See United States v. Hardy*, 77 M.J. 438, 443 (C.A.A.F. 2018) ("[A]n unconditional guilty plea waives any unpreserved unreasonable multiplication of charges objection."); RULE FOR COURTS-MARTIAL (R.C.M.) 905(b)(2) and 905(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.).

Although the appellant's UMC claims are waived following his unconditional guilty pleas, we are mindful of our responsibility to affirm only such findings of guilty and the sentence as we believe, on the basis of the entirety of the record, should be approved. Article 66(c), UCMJ. We are "required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error." *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016). Having so assessed the record, and finding no error in light of the five non-exclusive factors articulated in *United States v. Quiroz*, 55

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tute an unreasonable multiplication of charges with the affiliated larceny offenses to which he pleaded guilty.

[5] In the providence inquiry and in the stipulation of fact, the appellant stated he damaged the fence in order to gain entry into the Administrative Storage Program lot.

[6] The larceny offenses the appellant cites are Charge IV, Specification 9, alleging larceny of LVSR lights; Charge IV, Specification 8, alleging larceny of the military truck winch; Charge IV, Specification 10, alleging larceny of various items from the Mack motor pool; and Additional Charge, Specification 4, alleging larceny of ESAPI plates.

[7] As noted in *Hardy* but inapplicable to the appellant's trial, in cases referred to trial on or after 1 January 2019, the President's change to R.C.M. 905(e) specifies that failure to object under R.C.M. 905(b) will forfeit, not waive, the objection. *See* Exec. Order 13,825, 83 Fed. Reg. 9,889 (Mar. 8, 2018).

M.J. 334 (C.A.A.F. 2001), we believe it is appropriate to leave the accused's waiver "intact." *Chin*, 75 M.J. at 223.

B. Inappropriately Severe and Disparate Sentence

We review sentence appropriateness *de novo*. Article 66(c), UCMJ; *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). This includes our review of the appellant's claim of sentence disparity.

The appellant bears the initial burden to demonstrate any cases he cites are both: (1) "closely related" to his case; and (2) "highly disparate" in their sentence. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). Should the appellant satisfy this twofold burden, "then the [g]overnment must show that there is a rational basis for the disparity." *Id.* A case is "closely related" to another only when each case "involve[s] 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). There is no entitlement for co-conspirators to have equal sentences. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). In determining whether sentences are disparate, we look to the *adjudged* sentences, not the sentences as *approved* by the convening authority. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001). "Adjudged sentences are used because there are several intervening and independent factors between trial and appeal—including discretionary grants of clemency and limits from pretrial agreements—that might properly create the disparity in what are otherwise closely related cases." *United States v. Roach*, 69 M.J. 17, 21 (C.A.A.F. 2010).

In this case, the appellant contends that he and LCpl Grasty "pleaded guilty to *nearly identical* charges."[8] The record indicates that many of the appellant's offenses arose "from a common scheme or design" he had with LCpl Grasty. *Kelly,* 40 M.J. at 570. Certainly, the appellant's act of stealing *from* LCpl Grasty was not a "common scheme" among the two men. Nevertheless, we find the first *Lacy* factor is met for many of the specifications.

However, the appellant has failed to meet his burden regarding the second *Lacy* factor. There is only one document in *this record* which pertains to LCpl Grasty's court-martial. The appellant attached, as an enclosure to his clemency request, the pre-trial agreement that LCpl Grasty made with a different convening authority.[9] The pre-trial agreement lists LCpl Grasty's an-

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[8] Appellant's Brief of 23 Mar 2018 at 11 (emphasis added).

[9] *See* Clemency Request of 29 Aug 2017, Encl. (4).

ticipated pleas in a summary fashion, without reciting the content of the specifications. The appellant did not attach LCpl Grasty's charge sheet, Report of Results of Trial, or Convening Authority's Action. Importantly, the appellant has provided no information regarding LCpl Grasty's *adjudged* sentence. The appellant merely suggests that "[i]t appears [the appellant] pleaded guilty to two larceny charges that LCpl Grasty did not."[10] As a result, the appellant fails to demonstrate that his sentence is "highly disparate" with that of his co-conspirator.[11] *Lacy*, 50 M.J. at 288.

Thus, after reviewing the entirety of the record, including the evidence presented in extenuation and mitigation, we find that justice has been done and that the appellant received the punishment he deserved for his offenses. *See United States v. Healy*, 26 M.J. 394, 395 (C.A.A.F. 1988). Granting sentencing relief at this point would be to engage in clemency, which we decline to do. *See id.* at 395-96.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the approved findings and the sentence are correct in law and fact and that there is no error materially prejudicial to Appellant's substantial rights. Arts. 59 and 66, UCMJ. Accordingly, the findings and the sentence as approved by the convening authority are **AFFIRMED**.

FOR THE COURT:

RODGER A. DREW, JR.
Clerk of Court

[10] Appellant's Brief at 11 n.4.

[11] Notably, while we are under no obligation to review other appellants' records to resolve the appellant's AOE, we have elected to review the record in *United States v. Grasty*, No. 201700224, 2017 CCA LEXIS 673, (N-M. Ct. Crim. App. 31 Oct 2017) (unpub. op.). LCpl Grasty received an adjudged sentence which included 90 months' confinement—more than double the 44-month sentence of which the appellant complains. His claim of a disparate sentence is without merit.