UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PICKETT R. CANADA IV
United States Air Force

ACM 37481

09 November 2009

Sentence adjudged 18 May 2009 by GCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Mark Allred (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 11 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

HELGET, Senior Judge:

In accordance with his pleas, the appellant was found guilty of one specification each of conspiracy and fleeing apprehension, and three specifications each of larceny and housebreaking, in violation of Articles 81, 95, 121, and 130, UCMJ, 10 U.S.C. §§ 881, 895, 921, 930. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 11 months, forfeiture of all pay and allowances, and reduction to E-1.

The issue on appeal is whether the appellant's sentence is inappropriately severe where his adjudged and approved confinement is five-and-a-half times longer than that of his co-conspirator.

Background

At some point around the end of December 2007 and the beginning of January 2008, the appellant told Airman First Class (A1C) DM he had recently discovered the dorm key he was issued upon his arrival at Kadena Air Base (AB), Okinawa, Japan,* was actually a master key that could open other rooms in the dorm. On or about 2 January 2008, A1C DM informed the appellant that another airman in their squadron, A1C RF, owed him approximately $300-$400 and had been refusing to pay him back.

On three occasions between 2 January 2008 and 21 April 2008, the appellant unlawfully entered A1C RF's dorm room on Kadena AB and committed larceny therein. On 2 January 2008, the appellant, using his master key, unlawfully entered A1C RF's room and stole a digital camera and approximately $50 in cash and change. A1C DM was also present. Some of the money the appellant stole was in a plastic bag that contained $2 bills and some old coins. The appellant took the items and put them in his vehicle where they remained until seized by security forces investigators. On 19 March 2008, the appellant again unlawfully entered A1C RF's dorm room. While in the room, the appellant stole approximately $30 in cash and change, and a digital camera charger for the digital camera previously stolen. The appellant took the stolen items to his dorm room on Kadena AB. The digital camera charger was subsequently seized during a search of the appellant's dorm room by security forces investigators.

On 21 April 2008, A1C DM approached the appellant and said that A1C RF still owed him money. A1C DM asked the appellant to use his master key to enter A1C RF's room to search for the money he was owed. The appellant agreed and used his key to unlawfully enter A1C RF's room. The appellant initially entered the room by himself and left without taking anything. However, the appellant returned with A1C DM sometime later that day and stole two digital videos, two compact discs, and approximately $30 in cash and change. The appellant took the stolen items and placed them in his vehicle. During a search of the appellant's vehicle, two compact discs and one digital video were seized by the security forces investigators.

During the early morning hours on 27 April 2008, the appellant was outside the Banyan Tree Club on Kadena AB when he engaged in a physical altercation with another airman. While they were fighting, security forces came and separated them. When security forces attempted to apprehend the appellant, he fled and ran across the street into a dormitory where his friend was living. The appellant entered his friend's room and changed out of his clothes into his friend's clothes. When the appellant left his friend's

* The appellant arrived at Kadena Air Base, Okinawa, Japan, on 29 September 2006.

room, he was apprehended by security forces while walking outside in the dorm's parking lot.

In sentencing, the government called A1C RF. He testified that in January 2008, he noticed that his camera, a bag of collector coins, and some change were missing. He kept the bag of coins in his closet. He filed a complaint with security forces but nothing further happened. On 19 March 2008, when he returned to his room after work, he noticed that his room was in disarray. His bed was unmade, his couch had been moved, and his camera charger and some change had been stolen. A1C RF's chain of command attempted to have the locks to his dorm room changed but were informed nothing could be done. A1C RF then decided to set up a hidden video in his room. He spent approximately $550 on a video camera and an external hard drive to record the video. He installed the hidden video camera sometime in April 2008.

When A1C RF entered his room on 21 April 2008, he noticed that his room was again is disarray. He looked on his camera and noticed an individual, later identified as the appellant, had entered his room. About five minutes later, he noticed A1C DM, whom he knew, also had entered his room. They both went rummaging through all of his personal items, and the appellant also went through his closet. At this point nothing had been stolen. A1C RF decided to leave his room figuring that the appellant and A1C DM would return. Upon his eventual return to his room, he noticed that his room was again a mess. He went straight to his video camera and observed the appellant and A1C DM had re-entered his room and proceeded to go through everything he owned. The video shows the appellant searched his closet, pillowcase, and even his ceiling tiles. The video also shows the appellant holding what appear to be compact discs. A1C RF reported the incident to security forces the following day. During the investigation, he accompanied security forces investigators during their search of the appellant's vehicle and room, along with A1C DM's room and vehicle. None of A1C RF's stolen items were found in either A1C DM's room or his vehicle. A1C RF further testified that he did not owe A1C DM any money. In fact, he had lent A1C DM some money and had not been reimbursed.

Inappropriately Severe Sentence

The appellant asserts that his sentence is inappropriately severe when compared to A1C DM's sentence that included confinement for only 60 days. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We made such determinations by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268

(C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988). We "are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the [g]overnment must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288.

The maximum punishment in this case was a dishonorable discharge, 22 years and 6 months of confinement, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge, confinement for 11 months, forfeiture of all pay and allowances, and reduction to E-1.

Comparing the appellant's case to A1C DM, the appellant claims the two sentences are highly disparate. We disagree. A1C DM pled not guilty but was convicted in a special court-martial by a panel of officer and enlisted members of two specifications of conspiracy and one specification each for housebreaking and larceny for the 21 April 2008 incident in A1C RF's dormitory room. A1C DM was also found guilty of making a false official statement on 22 April 2008 concerning his unlawful entry of A1C RF's room and larceny therein. A1C DM was sentenced to a bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Although there are some similarities between the appellant's case and A1C DM's case, their sentences are not highly disparate. First of all, the appellant was tried by a general court-martial with a maximum authorized period of confinement of 22 years and 6 months, whereas A1C DM was tried by a special court-martial with a maximum of 12 months of confinement. Also, unlike A1C DM, who was only found guilty of committing larceny and housebreaking on 21 April 2008, the appellant was also found guilty of committing housebreaking and larceny on both 2 January 2008 and 19 March 2008. The appellant's offenses covered a period of four months, while A1C DM's offenses covered a period of only two days. Further, all of the stolen items were found in the appellant's possession, and it was the appellant who misused a master key that he possessed to wrongfully enter A1C RF's dormitory room. Accordingly, the appellant's conduct warranted a more severe punishment.

Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court