UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic VINCENT L. COLLINS
United States Air Force

ACM S30247

21 July 2004

Sentence adjudged 6 November 2002 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 3 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, and Major Harold M. Vaught.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Spencer R. Fisher (legal intern).

Before

STONE, JOHNSON, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

The appellant was convicted at a special court-martial, in accordance with his pleas. The Charge included one specification of wrongful use of marijuana, one specification of wrongful use of methamphetamine, and one specification of wrongful use of methylenedioxyamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He also was convicted of an Additional Charge involving one specification of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The military judge sentenced him to a bad-conduct discharge and confinement for 5 months. In accordance with a pretrial agreement, the convening authority reduced the confinement to 3 months.

The appellant invites us to compare his sentence to that received by Airman Basic (AB) Yeoman, with whom the appellant committed all three specifications of the Charge.

AB Yeoman was sentenced to confinement for 3 months, and forfeiture of $737.00 pay per month for 3 months. The appellant urges this Court to grant him sentencing relief. He argues that his sentence is inappropriately severe in light of AB Yeoman's sentence.

On 8 May 2002, the appellant accepted the invitation of AB Yeoman to go to an off-base residence belonging to a civilian friend. AB Yeoman wanted to have "one last night of fun" before entering Transition Flight.[1] While there, the civilian friend offered a marijuana cigar to the two airmen. They both smoked the cigar. These facts support the conviction of Specification 1 of the Charge.

During the providence inquiry with the military judge, the appellant related that while both he and AB Yeoman were assigned to Transition Flight, AB Yeoman said he had obtained Xanax pills. He offered one to the appellant, who put it in his drink to dissolve. AB Yeoman told the appellant it was a muscle-relaxing drug. The appellant knew Xanax was a prescription drug not prescribed for him, and he admitted that he had no legal justification to take the drug, and it was wrongful for him to take it. The appellant said that he found out that the pill contained methamphetamine when the urinalysis he consented to returned positive results for that drug. The appellant also acknowledged that he later learned this same pill contained methylenedioxyamphetamine based on the results from the same urine sample. These are the facts supporting the pleas to, and conviction of, Specifications 2 and 3 of the Charge.

We agree with the appellant's argument that up to this point the two airmen were guilty of the "very same offenses . . . based on the very same circumstances." However, the appellant faced an Additional Charge for stealing a package of cigarettes from the Base Exchange.

This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). In order to determine the appropriateness of the sentence, this Court must consider the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). The consideration of a grant of clemency, or mercy, is a separate analysis, not part of this Court's charter. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In this case, the appellant argues that this Court can execute its Article 66(c), UCMJ, responsibility only by comparing his sentence to that of his co-actor, AB Yeoman. Our superior court has acknowledged, however, that the sentence review function of the Courts of Criminal Appeals is highly discretionary. We are not required

[1] Transition Flight is that flight to which airmen awaiting involuntary discharge are typically assigned.

to engage in sentence comparison with specific cases "except 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. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)).

We conduct a three-part analysis when engaging in sentence comparison: (1) Are the cases closely related? (2) Are the sentences highly disparate? and (3) Is there a rational basis for the disparity? *Lacy*, 50 M.J. at 288. To be closely related, there must be a nexus between the two cases, such as "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.* In determining whether the sentences are "highly disparate," we are 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." *Id.* at 289. The appellant bears the burden of demonstrating that his case is closely related and the sentences are highly disparate. Assuming that burden is carried, the burden shifts to the government to show there is a rational basis for the disparity. *Id.* at 288.

Turning to the application of the law to these facts, we find that the appellant has met his burden of establishing that his offenses are closely related to those committed by AB Yeoman. There is a direct nexus between the two, as co-actors, as to three specifications of the original Charge. While the appellant committed an additional offense of larceny and AB Yeoman did not, we still find the cases to be closely related.

As to whether the sentences received by the two are highly disparate, we note that both airmen were ultimately ordered to serve the same period of confinement. The difference between the sentences is that AB Yeoman was sentenced to forfeit $737.00 pay per month for 3 months, while the appellant received a bad-conduct discharge. There is authority to support the appellant's argument that the difference with respect to a punitive discharge can make the sentences of co-actors "highly disparate." *See United States v. Durant*, 55 M.J. 258 (C.A.A.F. 2001); *United States v. Kent*, 9 M.J. 836, 838-39 (A.F.C.M.R. 1980). On the other hand, receiving a punitive discharge, when another does not, does not take the appellant's sentence out of the realm of relative uniformity. *See United States v. Hranac*, ACM S30025 (A.F. Ct. Crim. App. 9 Dec 2002) (unpub. op.). However, we need not decide this issue because we are convinced the government has met its burden of demonstrating a rational basis for the disparity.

Actually, there are two compelling reasons for the disparity. First, a military judge sentenced the appellant. It was a condition of his pretrial agreement, under which his confinement was capped at 3 months. He bargained away his opportunity to have members sentence him. Members sentenced AB Yeoman. This procedural difference establishes a rational basis for the difference in punishment. *See Durant*, 55 M.J. at 263

(Sullivan, J., concurring). Second, the appellant was convicted of an additional charge. While it was a "small" larceny, to be sure, its significance is in the timing. While under court-martial charges, this appellant stole property belonging to another, further diminishing his rehabilitation potential.

Having said that, we note that the evidence of rehabilitation potential in the appellant's case is otherwise similar to the evidence of rehabilitation potential in AB Yeoman's case. They each received two punishments under Article 15, UCMJ, 10 U.S.C. § 815, one for absence without authority, and one for wrongful use of marijuana, both occurring just weeks before the charged offenses took place. AB Yeoman received a third Article 15 for wrongful possession of marijuana occurring after the charged offenses, but discovered and punished before the charged offenses were known to the government. The government also offered two letters of reprimand against the appellant. AB Yeoman had three letters of reprimand and one letter of counseling.

We conclude that the appellant's sentence is well within the range of "uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *Lacy*, 50 M.J. at 287-88). The Court of Appeals for the Armed Forces has acknowledged, "the military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military accused is sentenced as an individual." *Durant*, 55 M.J. at 261 (citations omitted). In exercising our broad discretion, we hold the appellant's sentence is appropriate. We decline to mitigate the sentence simply because his co-actor received a comparatively lenient sentence at his court-martial. *See Durant*, 55 M.J. at 259.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the appellant's substantial rights 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator