UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class AUSTIN T. GAGE
United States Air Force

ACM S32052

12 July 2013

Sentence adjudged 12 March 2012 by SPCM convened at Royal Air Force Lakenheath, United Kingdom. Military Judge: Jefferson B. Brown.

Approved sentence: Bad-conduct discharge and confinement for 30 days.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL[1]
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Judge:

On 9 and 12 March 2012, the appellant was tried by a special court-martial composed of officer members. Consistent with his plea, the appellant was convicted of one specification of unlawful entry, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The members acquitted the appellant of one specification of damaging non-military property valued less than $500.00, in violation of Article 109, UCMJ, 10 U.S.C. § 909, and one specification of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The members sentenced the appellant to a bad-conduct discharge and 30 days of

[1] Upon our own motion, this Court vacated the previous decision in this case for reconsideration before a properly constituted panel. Our decision today reaffirms our earlier decision.

confinement. In matters submitted to the convening authority under Rule for Courts-Martial 1105, the appellant requested that his bad-conduct discharge be disapproved. The appellant's commander submitted a letter to the convening authority asking that he set aside the bad-conduct discharge.[2] On 23 April 2012, the convening authority approved the sentence as adjudged.

Background

On 2 June 2011, the appellant and Senior Airman LP were on duty as Security Forces personnel at Royal Air Force (RAF) Fetwell, United Kingdom. Senior Airman MM and Airman First Class BB were also on patrol during that shift. The group met up during the shift and discussed how building 17 at RAF Fetwell was supposedly haunted. The group decided to go "ghost hunting" in the building. The appellant and LP found an unlocked door near a fire escape. Once MM and BB arrived, the group entered the building. At trial, the appellant admitted the elements of unlawful entry during his *Care*[3] inquiry, and the military judge accepted his guilty plea as provident.[4]

Airman First Class BB was charged with the same specifications as the appellant: one specification of damaging non-military property valued less than $500.00, in violation of Article 109, UCMJ; one specification of larceny, in violation of Article 121, UCMJ; and one specification of unlawful entry, in violation of Article 134, UCMJ. Like the appellant, BB pled not guilty to and was acquitted of the specifications of damaging non-military property and larceny. Like the appellant, BB pled guilty to the specification of unlawful entry. In his court-martial, the members sentenced BB to hard labor without confinement for 30 days and reduction to E-1.[5] Unlike BB, however, the members sentenced the appellant to a bad-conduct discharge and 30 days of confinement. Before this Court, the appellant argues that his sentence is inappropriately severe, in light of the more lenient sentence imposed upon BB, and requests relief from the bad-conduct discharge. Under the circumstances, we agree and grant relief.

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[2] In a post-trial letter, the commander of the 48th Security Forces Squadron stated, in part: "For the single charge for which [the appellant] pled guilty and received sentence, I consider the confinement sufficient but the bad conduct discharge too severe. . . . Should the [special courts-martial] convening authority concur and waive the bad conduct discharge, it is still my intention as the squadron commander to initiate discharge proceedings against [the appellant]. I will consider then what characterization of discharge I will recommend."

[3] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[4] Both BB and LP testified under a grant of immunity in the findings portion of the appellant's court-martial on the charges under Articles 109 and 121, UCMJ, 10 U.S.C. §§ 909, 921, of which he was acquitted. On 12 December 2011, LP pled guilty to one specification of unlawful entry, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and one specification of larceny, in violation of Article 121, UCMJ. LP had a pretrial agreement in which he agreed to testify against BB and the appellant.

[5] The appellant's court-martial convened the same day that BB's sentence was adjudged, 9 March 2012. The military judge noted for the record that he had presided in the courts-martial for LP and BB, and he asked if either side wanted to question or challenge him from presiding in the appellant's court-martial. Both sides answered in the negative.

Sentence Severity

This case requires us to exercise our unique, highly discretionary authority under Article 66, UCMJ, 10 USC § 866, to determine sentence appropriateness. This analysis "includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001). We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005).

"[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.'" *Sothen*, 54 M.J. at 296 (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)) (citations and internal quotation marks omitted). We conduct a three-part analysis when engaging in sentence comparison: (1) whether the cases are closely related, (2) whether the sentences are highly disparate, and (3) whether there is a rational basis for the disparity. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

In raising the issue of sentence disparity, the appellant bears the burden of demonstrating that any cited cases are closely related to his case and that the sentences are highly disparate. *Id.* To be closely related, there must be a nexus between the 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.* Applying these criteria, we find that the appellant has met his burden of establishing that his case is closely related to that of BB. Both engaged in the same common crime and scheme, which certainly created a direct nexus between them. For their actions, the appellant and BB were each convicted of unlawful entry.

We next consider whether the appellant has met his burden of showing that the sentences are highly disparate. We note that both the appellant and BB were tried by special courts-martial and each faced the same jurisdictional maximum punishment. The difference is that the appellant, unlike BB, received not only a punitive discharge but also a period of confinement.[6] Considering the qualitative difference in the sentences in these closely related cases, we find that the appellant has met his burden of demonstrating that the sentences are highly disparate.

Having met his burden of proof, we now assess if the Government has met its burden of showing "a rational basis for the disparity." *Id.* at 288. The Government

[6] The members in the appellant's case were aware that BB had been charged with the same offenses as the appellant, and pled guilty to the unlawful entry specification. The members were not aware of the sentence BB received. Likewise, the members were aware of the charges and specifications to which LP pled guilty, but were not aware of his sentence.

argues that the appellant was the instigator of the crimes, he had a poor duty history, and, before imposing the sentence, the members were able to observe that BB and LP had not received a punitive discharge for their participation in the crimes. We are not convinced these arguments provide a rational basis for the disparity in this case.

First, the record does not clearly support the Government's assertion that the appellant instigated the unlawful entry. The testimony on this point is fuzzy at best. In his *Care* inquiry, the appellant states that "we all decided to go into Building 17 to look for ghosts." He further stated that he and LP "went ahead to the building, where we found an open door at the top of the fire escape staircase. . . . Once [BB] and [MM] arrived, we all went in together." On direct examination by trial counsel, BB testified that "[i]t was all of our idea" to go ghost hunting at building 17. The testimony of LP on this issue is inconsistent. On direct examination by trial counsel, LP testified at one point that it was the appellant's idea to go to Building 17, but he testified a few lines later that they "all discussed going to the . . . building."[7] Based on the record, we find it unclear who instigated the idea.

Second, the Government cites the appellant's prior nonjudicial punishment under Article 15, UCMJ, 10 U.S.C § 815, for wrongful appropriation as a basis for upholding his bad-conduct discharge. We do not know how the appellant's evidence of rehabilitation potential compares with that of BB.[8] Nor do we know what differences, if any, exist between the extenuation and mitigation evidence in each case.

Finally, the Government argues that the members chose a sentence for the appellant that included a bad-conduct discharge "even though they had observed that the other [A]irmen with him had not received a punitive discharge" and "were able to observe that both [BB and LP] were still clearly on active duty at the time of their testimony."[9] We acknowledge this argument but decline to speculate on what conclusions, if any, the members reached from the observations proposed by the Government. Based on the facts before us, we conclude that the Government has not met its burden of showing a rational basis for the disparity in sentences between the appellant and BB.

We are keenly aware that we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). We also are

[7] We also note that at the time of the offense, LP was a Senior Airman (E-4), and the appellant was an Airman First Class (E-3).

[8] The appellant received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for wrongful appropriation of a golf cart on 29 September 2011. The appellant was a Senior Airman at the time of the nonjudicial punishment. He received a reduction to the grade of Airman (E-2), with the reduction below Airman First Class suspended until 28 March 2012. In his written response to the nonjudicial punishment action, the appellant notes that BB was with him at the time of the incident. In his reply brief, the appellate defense counsel states that BB also received nonjudicial punishment, but we have no evidence to support that assertion.

[9] This is presumably because BB and LP testified in uniform and identified their current units of assignment.

keenly aware that sentence comparison is required only in "rare instances" by reference to "disparate sentences adjudged in closely related cases." *See Ballard*, 20 M.J. at 283. In practice, relief in sentence comparison cases has been exceedingly rare.[10] We find this case to be one of those "rare instances" where sentence comparison is required and appropriate. After a careful review of the record and limited to the unique facts of this case, we find that the appellant's sentence, which included both a bad-conduct discharge and confinement, was inappropriately severe. Therefore, we will exercise our unique, discretionary authority under Article 66, UCMJ, to provide relief.

Accordingly, in consideration of our finding of sentence disparity in this case, we approve only so much of the appellant's sentence as calls for confinement for 30 days.

Conclusion

The approved findings and sentence, as modified, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains. Article 66(c), UCMJ. Accordingly, the approved findings and sentence, as modified, are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[10] *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, § 17-15[C], n.38 (8th ed. 2012) (summary of the results from published cases analyzing sentence comparison). *See also* Lt Col Jeremy S. Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. REV. 79 (2010).