UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant RAMONA R. GREINER
United States Air Force

ACM 36606

17 December 2007

Sentence adjudged 21 September 2005 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 12 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Karen L. Hecker, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with her pleas, the appellant was convicted by general court-martial of one specification each of conspiracy to commit murder, dereliction of duty, and solicitation to commit murder, in violation of Articles 81, 92, and 134, UCMJ, 10 U.S.C. §§ 881, 892, 934. A military judge sentenced her to a dishonorable discharge, confinement for 15 years, and reduction to E-1. Pursuant to the terms of a pre-trial agreement, the convening authority reduced the period of confinement to 12 years, but otherwise approved the adjudged sentence.

The appellant asserts three errors:[1] (1) Her right to a fair trial was violated when she was sentenced by a military judge who spent his sentencing deliberation time with the trial counsel; 2) Her ability to present a complete sentencing case was violated when she was unable to submit certain portions of her character letters into evidence during sentencing; and 3) Her sentence is disproportionately severe. Finding no error, we affirm.

Conduct of the Military Judge

The appellant asserts the military judge spent his sentencing deliberation time with the trial counsel, creating the appearance the military judge was not fair and impartial. Based on that alleged conduct, the appellant argues the military judge should have sua sponte recused himself.

28 USC § 455 governs the recusal of military judges. *United States v. Jones*, 55 M.J. 317 (C.A.A.F. 2001); *United States v. Lynn*, 54 M.J. 202 (C.A.A.F. 2000). Subsection (a) of that statute requires a judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." *Jones*, 55 M.J. at 319. "The test for determining if recusal is necessary under this section is 'whether a reasonable person *who knew all the facts* might question these . . . military judges' impartiality.'" *Id.* (quoting *United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994) (emphasis in original)).

Appellate courts review a judge's decision on questions of recusal for abuse of discretion. *Jones*, 55 M.J. at 320. When, as here, an appellant does not raise the issue until appeal, we apply a plain error standard of review.[2] *Id.*

The alleged conduct is not evident from the record of trial, but is supported by a personal declaration of the appellant submitted with her appeal. In response, the government submitted declarations from the military judge and trial counsel. Faced with competing post-trial affidavits, we apply the factors set forth by our superior court in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), to determine whether a fact finding hearing is required to resolve the issue or whether the affidavits and record are sufficient.

When considering post-trial affidavits, the threshold question is whether they create a factual dispute material to the resolution of the post-trial claim. *United States v. Fagan*, 59 M.J. 238, 243 (C.A.A.F. 2004). If they do not, then a post-trial hearing may

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

[2] The appellant asserts the plain error standard should not apply because the military judge announced sentence so quickly she did not have time to raise the issue at trial. The record does not support this assertion. Although the time between reopening of the court to announce sentence and adjournment was relatively short, it still provided ample time for the appellant, through her counsel, to raise a challenge to the military judge had she desired to do so.

not be required. In deciding whether the affidavits create a factual dispute, the second *Ginn* factor requires that we consider whether an affidavit sets forth speculative or conclusory observations rather than specific facts. *Id.* Applying these guidelines, we conclude the post-trial affidavits submitted in this case do not create a material factual dispute and are sufficient on their face to resolve the appellant's claim.

The record of trial indicates the military judge closed the court for sentence deliberation at 1209 hours and reopened the court to announce sentence at 1335 hours. When he closed the court, the judge observed that, given the time, the parties would be able to go to lunch while he deliberated. In support of her claim that the military judge thereafter spent his deliberation time with the trial counsel, the appellant submitted a personal affidavit asserting as follows:

> I saw [the judge] leave for lunch with the Prosecution on the 21st of September 2005. The judge . . . had no paper or briefcase with him. Came back about an hour or so later with the prosecution laughing. Called the court to order and announced sentence.

In considering this affidavit, it is important to recognize what portions are factual assertions and what is speculation. The pertinent factual assertions are that the military judge and the prosecution left the courtroom at the same time and returned at the same time. However, it is evident the appellant did not accompany the military judge or observe him over the intervening period between his departure and return. As a result, her assertion that the military judge and prosecution had lunch together is purely speculative. Even more so is her further assertion of error that the military judge spent his sentence deliberation time with the trial counsel.

Contravening the appellant's speculation are the affidavits from the military judge and the trial counsel. Both declare they did not lunch together, and the affidavit of the trial counsel further denies any ex-parte communications with the military judge. These un-rebutted factual declarations by the military judge and trial counsel overcome the appellant's speculative assertions as to what the military judge did between the time the appellant saw him leave and return and convince the Court this assertion of error is without merit. A reasonable person with knowledge of these facts would not question the military judge's impartiality and recusal was not required. *Jones*, 55 M.J. at 319.

Limitation on Sentencing Evidence

In her second assignment of error, the appellant states "[I]t was error for the parties to agree to remove . . . parts of [character letters] before they were accepted into evidence . . . the military judge should have reviewed and considered [them] as part of her sentencing case." It is unclear from this statement whether the appellant is urging us

to find judicial error or ineffective assistance of counsel. The record does not support a finding of either.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003); *United States v. Gogas*, 55 M.J. 521, 523 (A.F. Ct. Crim. App. 2001). However, it is clear from the record of trial that the military judge did not in this case exclude the evidence at issue. When the exhibits were offered, the government objected, primarily on the grounds that the defense had not established a sufficient foundation for some of the character assessments contained in the letters. After some initial discussion of the objection on the record, it became evident there was a genuine factual dispute as to whether some of the witnesses who wrote the letters had sufficient personal knowledge to provide the opinions at issue. Before adjourning for the evening, the military judge encouraged the parties to discuss the matter further to see if they could reach agreement, observing that he would then rule on the admissibility of any statement on which they continued to disagree. The following morning, the parties advised the military judge they had reached agreement, the defense offered redacted versions, and the government withdrew its objection. The military judge then admitted the evidence. It is clear that, while certain portions of some character letters were redacted, the redactions were done on a voluntary basis by the defense; they were not the result of an adverse ruling by the military judge.

Nor was trial defense counsel ineffective by deciding to redact certain portions of the letters. In order to be ineffective, the conduct of defense counsel must not only be deficient, but that deficiency must also prejudice the appellant. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). In this case, the record clearly shows a tactical decision by defense counsel to resolve objections to portions of character letters, rather than risk an adverse ruling on those objections. We will not second-guess this decision. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). Not only was it not deficient, it appears to have benefited, rather than prejudiced, the appellant, because it ensured the disputed character letters would be admitted into evidence.

Sentence Appropriateness

The appellant asserts 12 years of confinement is disproportionately severe, pointing both to the 18 years of confinement received by her more culpable co-conspirator and to an unrelated case in which the accused received 8 years of confinement for one specification each of conspiracy to commit murder and attempted conspiracy to commit murder. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United*

States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 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).

Although we generally consider sentence appropriateness without reference to other sentences, we are required to examine sentence disparities in closely related cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001). Closely related cases include those which pertain to "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." *Lacy*, 50 M.J. at 288. "[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.'" *Id.*

Although the court-martial of the appellant's co-conspirator is certainly a "closely related" case, we find no adverse disparity between the 18 years of confinement he received and the 12 years of confinement she received. The other case to which the appellant cites bears no connection to her conviction beyond a superficial similarity in offenses. Simply because some other offender received a lesser punishment for similar offenses in the past does not make the appellant's sentence disproportionately severe. Considering the seriousness of the appellant's offenses, and taking into account her military service record and all of the evidence of record properly admitted at trial, the adjudged sentence is fair, just, and appropriate.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court