UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman LORIN J. GRIGSBY
United States Air Force

ACM 38108

10 September 2013

Sentence adjudged 2 December 2011 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: William C. Muldoon.

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

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Before

ORR, HELGET, and WEBER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WEBER, Judge:

At a general court-martial, the appellant pled guilty to several drug-related charges: one charge and one specification of conspiracy to possess marijuana with the intent to distribute; one charge and three specifications of wrongful distribution of marijuana and wrongful possession of marijuana with intent to distribute; and two charges, each consisting of one specification, of intentionally conducting financial transactions involving the proceeds of unlawful activity (marijuana distribution). The charges and specifications represented violations of Articles 81, 112a, and 134, UCMJ, 10 U.S.C. §§ 881, 912a, 934. The military judge accepted the appellant's guilty plea with some exceptions. Thereafter, a panel of officer and enlisted members sentenced the

appellant to a dishonorable discharge, confinement for 17 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. In an act of clemency, the convening authority disapproved the forfeiture of pay and allowances and confinement in excess of 12 years.

The appellant alleges three errors: 1) His sentence is inappropriately severe compared to other similar cases; 2) The military judge erred by granting only one day of confinement credit after determining that the appellant endured 60 days of illegal pretrial punishment; and 3) The staff judge advocate erred by drafting the post-trial recommendation to the convening authority after testifying on a contested issue. Finding no error materially prejudicial to a substantial right of the appellant, we affirm the findings and sentence as approved.

Background

In May 2010, an Internal Revenue Service (IRS) agent contacted the Air Force Office of Special Investigations (AFOSI) to report that the appellant had engaged in suspicious activity in two bank accounts he held. The IRS agent reported that a person in Georgia had deposited tens of thousands of dollars in the accounts since March 2010 in large sums, and that the money had had promptly been withdrawn in the appellant's location in Tucson in similarly large sums. AFOSI began to investigate this matter.

While the AFOSI investigation was proceeding, but before the appellant was notified of the investigation, Tucson police were dispatched to the appellant's apartment complex in response to an early morning complaint of a suspicious vehicle. The vehicle – the appellant's – was parked in a handicap spot with the passenger door open. Tucson police knocked on the appellant's door and spoke with the appellant. During the conversation, the appellant stated that he had been out drinking at a billiards hall that night. One police officer recalled that there had been a shooting at the same billiards hall that night and that the shooter roughly matched the appellant's description. The police officer asked the appellant if he had a gun. The appellant said he did, and that it was in his car. The officer did not find the weapon in the car, but did find a spent shell casing on the car's floor. The police then handcuffed the appellant and asked for his consent to search the apartment for the gun. The appellant initially refused, citing a concern that they would find marijuana belonging to his roommate. After several minutes, and after police assured him their primary concern was the gun, the appellant consented.

Inside the apartment, the police quickly located the firearm on the couch armrest, where the appellant said it would be. Based on the appellant's statement that a roommate may be home, police conducted a "protective sweep" of the apartment, trying to determine if anyone else was present who might present a threat to their safety. The police noticed a large amount of apparent drug shipping material either immediately upon entering or while conducting their sweep. After the police secured the gun, AFOSI

agents arrived and accompanied the police as they executed a search warrant in the apartment and interviewed the appellant. The search revealed packaging materials, large rolls of plastic wrap, tape, shipping labels, foam spray, scales, and about 10 pounds of marijuana wrapped in a "brick." The appellant also made several incriminating statements to police.

The Air Force requested and was granted investigative and prosecutorial authority over this case. The remainder of the AFOSI investigation revealed that the appellant also "laundered" money through a handful of accounts, receiving cash deposits in an account from Georgia and then personally withdrawing the funds or having someone else withdraw the funds for him in Arizona. A postal inspector also discovered that the appellant attempted to mail a package of more than 16 pounds of marijuana to an address in Georgia. During the investigation, the appellant was ordered into pretrial confinement, where he remained until trial.

At trial, the appellant pled guilty, without the benefit of a pretrial agreement, to all charges and specifications except one conspiracy specification, which was dismissed after arraignment.[1] The record contains no evidence that the military charged the appellant in connection with the shooting at the billiards hall.

Sentence Appropriateness

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-85 (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 assess sentence appropriateness 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. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). We have a great deal of discretion in determining whether a particular sentence is appropriate but we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 395, 396-96 (C.M.A. 1988).

In exercising sentence appropriateness review, "[t]he Courts of Criminal Appeals 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)). An appellant bears the burden of demonstrating that any cited cases are "closely

[1] The dismissed specification alleged conspiracy to violate Article 134, UCMJ, 10 U.S.C. § 934, by wrongfully conducting financial transactions involving the proceeds of unlawful activity.

related" to the appellant's case and the sentences are "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). 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." *Id*. If the appellant meets his or her burden to demonstrate closely related cases involve highly disparate sentences, the Government "must show that there is a rational basis for the disparity." *Id.*

The appellant argues that his sentence is inappropriately severe when compared to other Air Force cases involving possession of marijuana with the intent to distribute. He cites four opinions from this Court since 2001 in which the appellants were convicted of possessing marijuana with the intent to distribute it. In all four cases, the appellants' sentences to confinement were less than the adjudged or approved confinement in the instant case. Dividing the amount of confinement by the pounds of marijuana involved in those cases, the appellant argues that his sentence to confinement is 65 to 1700 percent harsher than the cases he cites.

We hold that the appellant has not met his burden of demonstrating that the cited cases are closely related to his. Two of the four cases he cites involved a sole charge of marijuana possession with intent to distribute. A third case involved one instance of conspiracy in addition to the possession with intent to distribute charge, while the fourth involved possession of a Schedule IV controlled substance in addition to marijuana possession with intent to distribute. The appellant's case involves dramatically different charges evincing greater misconduct. He was convicted of two separate specifications of wrongful possession with intent to distribute (including one specification of divers instances of this misconduct), plus actually distributing more than 16 pounds of marijuana through the U.S. mail. He was also convicted of conspiring with a civilian to possess marijuana with the intent to distribute, plus two charges and specifications of intentionally conducting financial transactions involving the proceeds of marijuana distribution. Because the cited cases are not closely related to that of the appellant, we are not required to engage in sentence comparison. *See Sothen*, 54 M.J. at 296. Furthermore, we decline the opportunity to do so under these circumstances.

Even assuming the cited cases are closely related to the appellant's case, and assuming the sentences are highly disparate, we would find a rational basis for the disparity. The appellant actually distributed more than 16 pounds of marijuana by placing a package in the U.S. mail. Moreover, he was convicted of essentially laundering about $150,000 through various bank accounts, including the bank account of an unwitting friend who facilitated the appellant's illicit financial transactions through her account without appreciating the illegal nature of the appellant's actions. The appellant was convicted of possessing more than 10 pounds of marijuana with the intent to distribute on the day he was caught and, by his own admission, he possessed marijuana

on divers other occasions with the intent to distribute it. The appellant's sentence warrants no relief on the basis of sentence comparison.

We next consider whether the appellant's sentence was appropriate "judged by 'individualized consideration' of [the appellant] 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. Applying these standards to the present case, we do not find the adjudged or approved sentence inappropriately severe.

Confinement Credit

At trial, the appellant moved for three-for-one administrative credit toward any sentence of confinement, alleging that he suffered illegal pre-trial punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813. About four months after the appellant was ordered into pretrial confinement, he smuggled a screwdriver into the confinement facility and referred to the screwdriver as a "shank." Confinement personnel placed the appellant into administrative segregation, a status that allowed them to better observe him and preserve the safety of all personnel in the confinement facility. The appellant remained in administrative segregation for 46 days, until shortly before a disciplinary and adjustment board convened. After the board concluded, confinement personnel placed the appellant back in administrative segregation, citing concerns about the effect the board may have on the appellant. He remained in administrative segregation for an additional 31 days, making a total of 77 days of administrative segregation following the screwdriver incident.

After receiving evidence and argument concerning the defense motion for administrative credit, the military judge concluded that confinement officials had no intent to punish the appellant by placing him in administrative segregation. He found that good cause existed for placing the appellant into administrative segregation both times, but that both times the Government had inadequate justification for keeping the appellant in administrative segregation for as long as it did. He ruled that of the 77 days the appellant was in administrative segregation, only 17 days were justified, leaving 60 days of his time in administrative segregation as unlawful pretrial punishment. Therefore, he found that "the accused [was] entitled to administrative sentencing credit for those 60 days." However, he declined to grant three-for-one credit, based on his finding that the Government had no intent to punish the appellant. His ruling concluded, "Given the relatively minimal difference between the status of regular pretrial confinement and administrative segregation and the complete lack of any evidence showing an impact on

the accused, the court will order an additional one day of administrative credit for the aforementioned 60 days."

"The proper application of credit for illegal pretrial punishment is a question of law, reviewed de novo." *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002). "[M]eaningful relief for violations of Article 13, UCMJ, is required, provided such relief is not disproportionate in the context of the case, including the harm an appellant may have suffered and the seriousness of the offenses of which he was convicted." *United States v. Zarbatany*, 70 M.J. 169, 177 (C.A.A.F. 2011).

The appellant concedes that since the military judge found the Government did not intend to punish the appellant by placing him in administrative segregation, two-for-one or three-for-one credit is not an appropriate remedy. He contends, however, that the military judge should have granted the appellant one-for-one credit for the 60 days he found the appellant was illegally punished, thereby awarding the appellant 60 days of credit instead of the one day the appellant believes the military judge granted the appellant. We agree, except that the appellant's argument is based on a false premise. Our review of the record convinces us the military judge intended to take exactly the action the appellant requests on appeal. The military judge's written ruling found that "the accused is entitled to administrative sentencing credit for those 60 days." He then inartfully concluded that "the court will order an additional one day of administrative credit for the aforementioned 60 days." However, it is apparent that the military judge intended this to mean that he was awarding one day of credit for each of the 60 days in question. This is supported by the fact that in sentencing proceedings, he clearly informed the parties that the appellant was entitled to "60 days as a result of this motion." Soon thereafter, he again referenced the 60 days of credit he awarded the appellant on this matter. Therefore, the military judge already awarded the appellant the exact relief he petitions this Court to provide.

We note, however, that the Action failed to credit the appellant with the 60 days of confinement the military judge awarded.[2] Pursuant to Rule for Courts-Martial (R.C.M.) 1107(f)(4)(F), credit directed by the military judge for R.C.M. 305(k) violations must be reflected in the action. Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.4.1 (6 June 2013) extends this requirement to credit awarded on the basis of Article 12, UCMJ, 10 U.S.C. § 812, or Article 13, UCMJ, violations. Given the confusion resulting from the military judge's order, we deem it necessary for the

[2] In addition to the Article 13, UCMJ, 10 U.S.C. § 813, motion discussed here, the military judge awarded the appellant additional credit for illegal pretrial confinement during the first seven days the appellant spent in pretrial confinement. The military judge ruled that the appellant was to receive a total of 15 days credit – 14 days as two-for-one credit for this initial seven-day period plus one day of credit for time served in a civilian confinement facility on the day police searched his apartment and questioned him. The Action properly reflects the award of the 14 days as two-for-one credit for the initial seven days spent in pretrial confinement. The military judge did not rule that the additional day spent in civilian confinement was unlawful pretrial confinement; therefore it is not required to be documented in the Action.

convening authority to follow the AFI's requirements in this case. Accordingly, we order a corrected Action be accomplished in this case, referencing the 60 days of credit awarded by the military judge for illegal pretrial punishment in violation of Article 13, UCMJ.

Staff Judge Advocate's Recommendation

Finally, the appellant alleges that the staff judge advocate (SJA) erred in drafting the post-trial recommendation to the convening authority after testifying in the court-martial on a contested issue. At trial, the defense moved to dismiss the charges and specifications due to an improperly constituted panel. The appellant had requested a trial before a panel of officer and enlisted members, and in response, the convening authority selected six senior noncommissioned officers as primary members, plus a mix of master sergeants and technical sergeants as alternates. The defense asserted that the Government improperly excluded staff sergeants from consideration for service as members. In response to this motion, the government called Colonel (Col) JS, the convening authority's SJA. Col JS testified as to his process for presenting member selection packages to the convening authority, and stated that he had briefed the convening authority on the criteria for selecting members outlined in Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2). Col JS testified that the convening authority applied the Article 25(d)(2), UCMJ, criteria in selecting members for the appellant's case, which resulted in him selecting the more senior members from the nominees presented to him. He also testified that this was an important case, and that the convening authority wanted more senior representation on the panel to reflect its importance. Based on the SJA's testimony and other documentary evidence presented, the military judge determined that the defense failed to establish that the convening authority deliberately and systematically excluded lower grades from the panel, and he denied the motion. After trial, Col JS signed the SJA's recommendation for the convening authority.

Whether an individual is disqualified from serving as the staff judge advocate is a question of law we review de novo. *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004). However, the appellant has an "initial burden of making a prima facie case" that the SJA served in a disqualifying role. *United States v. Wansley*, 46 M.J. 335, 337 (C.A.A.F. 1997).

R.C.M. 1106(b) states that certain personnel – including a member, military judge, trial or defense counsel, or investigating officer – are disqualified from later acting as SJA to any convening authority in the same case. The Rule's discussion also states that the SJA may be ineligible where the SJA "testified as to a contested matter (unless the testimony is clearly uncontroverted) . . . ." Our superior court has similarly held that a SJA who testifies as to a contested issue is disqualified from later advising the convening authority as SJA in the case, because "a person who testifies in a case and later has to assess his own testimony is not likely to give it less than absolute credibility and the

fullest possible effect." *United States v. Choice*, 49 C.M.R. 663, 665 (C.M.A. 1975). On the other hand, "testifying as to a matter of formality or giving testimony that is uncontroverted does not disqualify the SJA or legal officer." *Wansley*, 46 M.J. at 337. The test to be applied in differentiating the two situations is one of "objective reasonableness" – in other words, "[i]f from [the SJA's] testimony, it appears that he has a personal connection with the case, he may not act as reviewing authority. On the other hand, if his testimony is of an official or disinterested nature only, he may properly review the record." *Choice*, 49 C.M.R. at 665 (quoting *United States v. McClenny*, 18 C.M.R. 131, 137 (C.M.A. 1955)).

Applying this objective reasonableness test to the instant case, we find that Col JS was not disqualified from advising the convening authority in the post-trial review process. The appellant alleges that Col JS was placed in a position where he had to defend his performance and that of his superior (the convening authority) to the court-martial. However, a fair reading of his testimony on the defense motion indicates only an official interest in the court member selection process issue. His testimony was relatively brief, and it appeared objective and straight-forward. Col JS revealed no predisposition as to the issue's outcome. The military judge wholly adopted Col JS's testimony into his findings of fact, indicating there was little factual dispute about the matters to which Col JS testified. Col JS's testimony was the only testimony presented on the defense motion; thus, Col JS was not asked to weigh his testimony against conflicting testimony in the post-trial recommendation. It is also worth noting that the underlying issue on which Col JS testified – the makeup of the court-martial panel – was only one of a multitude of issues raised by the defense in clemency, and was not the focus of the defense's clemency request. We find that it was objectively reasonable for the SJA to sign the post-trial recommendation and that the recommendation itself was impartial.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are affirmed. Because the Action fails to include the additional 60 days of pretrial confinement awarded by the military judge, the Action is incorrect.

Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous Action and substitute a corrected Action. Further, we order the promulgation of a corrected Court-Martial Order reflecting the correct Action. Thereafter, Article 66, UCMJ, shall apply.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court