UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant GEORGE C. KING
United States Air Force

ACM 36614

29 November 2007

Sentence adjudged 21 September 2005 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Barbara G. Brand.

Approved sentence: Bad-conduct discharge, a reprimand, and reduction to E-2.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall and Major John N. Page, III.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, and Captain Jamie L. Mendelson.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was convicted by general court-martial of conspiracy and violation of a lawful general regulation, in violation of Articles 81 and 92, UCMJ, 10 U.S.C. §§ 881, 892. A panel of officers sentenced him to a bad-conduct discharge, hard labor without confinement of 45 days, a fine of $1500, reduction to E-2, and a reprimand. The convening authority approved only the bad-conduct discharge, reduction to E-2, and a reprimand.

On appeal, the appellant raises four issues:

I. WHETHER THE CONSPIRACY CHARGE AND ITS SPECIFICATION SHOULD BE DISMISSED IN ACCORDANCE WITH WHARTON'S RULE BECAUSE THE UNDERLYING OFFENSE OF THE CONSPIRACY, SHARING OF CONTROLLED TEST MATERIAL, REQUIRES TWO PARTICIPANTS.

II. WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY IN LIGHT OF THE KEY GOVERNMENT WITNESS'S LACK OF CREDIBILITY AND THE LACK OF EVIDENCE CONNECTING APPELLANT TO E-MAILS CONTAINING PURPORTED CONTROLLED TEST MATERIAL.

III. WHETHER THE MILITARY JUDGE ERRRED BY FAILING TO INSTRUCT THE MEMBERS IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 1005(e)(4).

IV. WHETHER THE APPELLANT'S SENTENCE THAT INCLUDES A PUNITIVE DISCHARGE IS INAPPROPRAITELY SEVERE IN LIGHT OF OTHER SENTENCES IN CLOSELY RELATED CASES AND HIS EXEMPLARY SERVICE RECORD.

Background

This case arises out of the appellant's efforts to cheat on his examination for promotion to Master Sergeant in March of 2000. He accomplished his goal by joining in with another noncommissioned officer who served as the focal point for a broader common scheme to cheat on promotions testing with even more noncommissioned officers. The appellant was successful in both cheating and getting promoted.

To protect the integrity of the promotion system, Air Force instructions prohibit the wrongful use of controlled promotion testing materials. Specifically, Air Force Instruction 36-2605, *Air Force Military Personnel Testing System*, (17 Jun 94), states "Air Force members . . . will not possess, reproduce, distribute, or communicate in any way the contents of CONTROLLED TEST MATERIAL unless authorized in this instruction."[1] *Id.* at ¶ 5.7 (emphasis in original). The appellant does not dispute this instruction is a punitive general regulation enforceable under the provisions of Article 92, UCMJ.

[1] This 1994 version was in effect until March of 2003. An excerpt of the 1994 version was admitted as a prosecution exhibit.

The appellant was a career personnel specialist, with over 20 years of service at the time of trial. Between 29 February 2000 and 13 March 2000, the appellant exchanged emails with MSgt S in an effort to collaborate on the production and sharing of controlled test material. The shared materials consisted of questions and answers assembled from unspecified sources in an effort to duplicate the actual test. This was usually accomplished by asking examinees to recreate test questions from memory shortly after taking the test, then passing the information to others who had not yet tested. The appellant personally sent and received mirrored test questions and answers. After taking the test himself, the appellant fine-tuned the materials before returning them for the final time to MSgt S.

Wharton's Rule

The appellant claims for the first time on appeal that the conspiracy offense violates Wharton's Rule and that his conviction for conspiracy must therefore be set aside. We disagree.

A conspiracy to commit an offense and the subsequent commission of the substantive crime that is its immediate end do not merge upon completion of the latter, but may be separately charged and punished. *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975); *United States v. Crocker*, 18 M.J. 33, 36 (C.M.A. 1984). This principle is based on recognition that criminal conspiracies pose serious threats to civilized society, quite apart from the crimes that are their object. In *United States v. Rabinowich*, 238 U.S. 78, 88 (1915), the Supreme Court stated:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices.

An exception to this general principle is Wharton's Rule, a judicial presumption which, in the absence of legislative intent to the contrary, precludes conviction of both the conspiracy and the completed substantive offense if the substantive crime, by its very nature, requires concerted action by two people. *Iannelli*, 420 U.S. at 782-84; *Crocker*, 18 M.J. at 37. The rule is captured in the guidance on conspiracy contained in the *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 5.c.(3) (2005 ed.). *See also id.* at A23-2. Classic offenses falling within the purview of Wharton's Rule include dueling, incest, adultery, and bigamy. *Iannelli*, 420 U.S. at 782. Such offenses are "characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the

substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large." *Id.* at 782-83 (footnotes omitted).

Wharton's rule generally "applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because *both* require collective criminal activity." *Id.* at 785 (emphasis in original) (*quoted in Crocker*, 18 M.J. at 38). In determining whether an offense requires concerted criminal activity, we must "look to the wording, definitions, and elements of the substantive law violated, rather than to the actual facts of the particular offense as charged." *United States v. Earhart*, 14 M.J. 511, 514 (A.F.C.M.R. 1982), *aff'd*, 18 M.J. 421 (C.M.A. 1984). Thus, if the substantive crime that is the object of the conspiracy can be committed without the criminal agreement of both parties, Wharton's Rule may not apply. *Id.* at 514-15. Accordingly, Wharton's Rule did not preclude conviction of both transfer of cocaine and conspiracy to transfer cocaine. *Id.* at 514-16. It also did not preclude conviction of conspiracy to violate a lawful regulation and violation of the same regulation. *United States v. Wood*, 7 M.J. 885 (A.F.C.M.R. 1979).[2]

Wharton's Rule also does not bar conviction of both conspiracy and the underlying substantive offense if the general characteristics attendant to classic Wharton's Rule offenses are not present. Thus, if there is no general congruence of the conspiracy agreement and the substantive offense, but rather the conspiracy extends over some period of time and "by acting in unison, the two men were able to achieve results which they could not have achieved separately," then Wharton's Rule will not bar conviction of both offenses. *Crocker*, 18 M.J. at 38-39 (holding that where the "concerted activity of appellant and [his co-conspirator] extended over a period of several days," the appellant could be convicted and sentenced for both conspiracy to transfer cocaine and transfer of cocaine). Similarly, if the immediate consequences of the crime are not limited primarily to the co-conspirators, but significantly affect the larger society in which they operate, Wharton's Rule does not apply. *See Wood*, 7 M.J. at 887 (holding that Wharton's Rule did not bar conviction of conspiracy to violate a regulation prohibiting black-market trade and actual black-market trade, because "[t]he societal harm attendant upon the violation of the regulation is not restricted to the parties to the agreement"); *United States v. Osthoff*, 8 M.J. 629, 630 (A.C.M.R. 1979) (holding that Wharton's Rule did not bar conviction for conspiracy to distribute marijuana and distribution of marijuana because "[a]greements that accompany unlawful transfers of

[2] We note that the Navy-Marine Corps Court, relying on this same restriction in two recent unpublished decisions, has similarly held that Wharton's Rule did not preclude conviction of conspiracy to distribute ecstasy and distribution of ecstasy, *United States v. Boyd*, 2007 CCA LEXIS 417 (N.M. Ct. Crim. App. 26 Sep 2007) (unpub. op.), or conviction of both conspiracy to wrongfully dispose of military property and wrongful disposition of the same military property, *United States v. Fritz*, 2006 CCA LEXIS 295 (N.M. Ct. Crim. App. 21 Nov 2006) (unpub. op.). *Cf. United States v. McClelland*, 49 C.M.R. 557 (A.C.M.R. 1974) (holding Wharton's Rule barred conviction of both conspiracy to transfer marijuana and transfer of marijuana to the same party).

drugs tend to pose the kind of threats to society that the law of conspiracy seeks to prevent").

Applying these principles to the conspiracy specification and charge challenged we find that the appellant's offenses fall outside the purview of Wharton's Rule.

The substantive offense of which the appellant was convicted involves a violation of a lawful general regulation. That substantive offense is the type that can be committed by the appellant alone. It does not require "concerted criminal activity," by "a plurality of agents." *Iannelli*, 420 U.S. at 785. As a result, Wharton's Rule does not apply and conspiracy to violate the regulation may be separately charged and punished. *Wood*, 7 M.J. at 887. The same holds true even if we consider the nature of the regulatory violation, *i.e.,* the prohibited distribution of controlled testing material. As recognized in cases addressing "distribution" or "transfer" offenses in other contexts, criminal prosecution of the distributor does not depend on the criminal culpability of the person receiving the illicit material. *Earhart*, 14 M.J. at 516. The same applies here.

In addition, unlike classical Wharton's Rule offenses, the immediate consequences of the offenses here at issue are not limited primarily to the appellant and his co-conspirator. It is clear that the appellant and his co-conspirator achieved results they could not have achieved if they had acted alone. By actively conspiring with another airman to violate lawful general regulations governing Air Force activities, the appellant and his co-conspirator succeeded in perfecting the quality of the contraband material they produced. The appellant's crimes also detracted, generally, from the integrity of the Air Force promotion process, a process that is extremely important to the quality and morale of the Air Force enlisted corps. The tests are designed to ensure that only the most qualified airmen are promoted to senior levels of leadership. Compromising the testing process increases the likelihood that less qualified airmen might be promoted over more qualified airmen, potentially damaging the reputation of the enlisted corps in the eyes of members and non-members alike.

Legal and Factual Sufficiency

The appellant asserts that we should set aside the findings of guilty because they are not supported by the evidence such that we can find them legally and factually sufficient beyond a reasonable doubt. Specifically, the appellant attacks the testimony of the co-conspirator and the lack of any direct evidence to show that the appellant was the sender or the recipient of the culpable emails and information found on the appellant's computer.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether,

considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all of the elements of the offense proven beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325.

The appellant's arguments before this Court are essentially identical to the arguments made before the triers of fact and like them; we too find them to be without merit. While testimony of co-conspirators is to be judged with some suspicion, that does not mean that it cannot be used to support a conviction. We are satisfied ourselves, when we review the direct and circumstantial evidence in this case, the appellant is legally and factually guilty beyond a reasonable doubt.

Failing to Instruct the Members

At trial, the military judge instructed the members on the law and procedures they were to follow in determining an appropriate sentence. The military judge failed, however, to instruct the members that they should not impose a higher punishment in reliance on the possibility of any mitigating action being taken by the convening or higher authority. The trial and the defense counsel made no objections to this sentencing instruction omission. The appellant now claims error.

This Court reviews the completeness of required instructions de novo. *United States v. Miller*, 58 M.J. 266, 269 (C.A.A.F. 2003). Required instructions on sentencing includes a "statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority." Rule for Courts-Martial (R.C.M.) 1005(e)(4); *see also* Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 2-6-9 (15 Sep 2002). Although trial defense counsel did not object to the military judge's instructions, or call the missing instruction to the military judge's attention, the waiver rule is "inapplicable to certain mandatory instructions," such as the one required under R.C.M. 1005(e)(4). *Miller*, 58 M.J. at 270; *see also United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). The military judge bears the primary responsibility for ensuring that mandatory instructions are given; therefore, we conclude that the military judge erred by failing to instruct the court members as required by R.C.M. 1005(e)(4).

That, however, does not conclude our inquiry, for we are required to examine the sentencing instructions in their entirety and test for prejudice. *Miller*, 58 M.J. at 270-71. We note that despite the absence of the specific instruction at the appropriate point in the sentencing instructions the military judge had previously advised the members in a

similar vein earlier in the trial. Specifically, in voir dire the judge advised the members, that they must all "be fair and impartial and open-minded in . . . consideration of an appropriate sentence." During sentencing instructions, she advised the members that it was their duty to determine an appropriate sentence that they "regard as fair and just when it is imposed and not one whose fairness depends upon actions of others." While we do not conclude that these instructions "substantially covered" the missing instruction, they were relevant to our determination that there is no prejudice. *See United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citing *United States v. Winborn*, 34 C.M.R. 57, 62 (C.M.A. 1963) (setting forth standards for determining error regarding omitted instructions)).

The appellant faced a maximum punishment of a dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, a fine, and reduction to E-1. The prosecution argued for a bad-conduct discharge, confinement for 2 years, total forfeiture of all pay and allowances, a fine of $21,348, and reduction to E-1. Despite this argument, the panel's sentence included no confinement, no fine, and reduction to only E-2. While it is clear from the panel's questions they were concerned about the impact of a bad-conduct discharge on retirement this does not demonstrate prejudice from the missing instruction. With 20 years of service, it is only reasonable that the members expressly sought a clarification of the impact of a punitive discharge on retirement. The question does not demonstrate prejudice. Looking at the totality of the instructions provided the members and the sentence imposed in light of the significance of the offenses we are satisfied that the appellant was not prejudiced by the absence of the instruction required by R.C.M.1005(e)(4).

Sentence Appropriateness

The appellant asserts that the portion of his sentence extending to a bad-conduct discharge is inappropriately severe in light of the sentences received by others in closely related cases and his exemplary service record.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 63 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004). Although we generally consider sentence appropriateness without reference to other sentences, we are required to examine sentence disparities in closely related cases. *Christian*, 63 M.J. at

717 (citing *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.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.*

Applying the above, we first conclude that the appellant has failed to meet his burden of showing that the other cases referenced by the appellant are "closely related" and thus warranting further consideration.[3] The appellant's evidence consists of vague comments made in his unsworn statement of punishments received by other co-actors with MSgt S. He provides no real details as to the level of participation by the co-actors or any real specificity as to the full punishment received by the co-actors. He also provided no information on precisely what punishments the referenced co-actors received. Finally, while the appellant's unsworn statement references a couple of co-actors involved with MSgt S, he offers no evidence on the 10 to 20 more co-actors involved with MSgt S. As such, we have no ability to evaluate these other cases to determine if they are truly "closely related" and if the punishments received are either highly disparate or if there is a reasonable basis for any perceived disparity. Considering the lack of any real substance provided by the appellant we are unable to "utilize the experience distilled from years of practice in military law" in comparing these cases. *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982) (quoting *United States v. Judd*, 28 C.M.R. 388, 394 (C.M.A. 1960) (Ferguson, J., concurring in the result)). We are however able to evaluate appellant's sentence on its own facts.

Looking to the appropriateness of the appellant's sentence, considering the gravity of the appellant's offenses, even in view of his 20 years of quality service, we find the sentence appropriate. There is no doubt the appellant had a successful unblemished career but his crimes are significant. With just 15 years of service at the time, the appellant actively conspired with a fellow noncommissioned officer to cheat on the most important aspect of the enlisted promotion system. This crime threatens the entire enlisted promotion system and thus the confidence all enlisted airmen have in their promotion system. It is also clear from the record that the appellant knew that his efforts would directly contribute to the ability of an unspecified number of additional fellow noncommissioned officers to cheat on the same test. Clearly, a punitive discharge is not inappropriately severe in light of his conduct.

[3] We do note that the appellant does not argue that his actual co-conspirator's case is "closely related." Apparently this is because his sentence was a dishonorable discharge and 42 months of confinement.

Conclusion

The findings and the 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 findings and the sentence are

AFFIRMED.

Judge BRAND did not participate.

OFFICIAL

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