UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SHARMAINE L. LATHAM
United States Air Force

ACM 38107 (recon)

18 July 2013

Sentence adjudged 11 January 2012 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 50 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland and Dwight H. Sullivan, Esquire.

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

Before

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

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with her pleas, the appellant was convicted by a military judge sitting as a general court-martial of one specification of willful dereliction duty, three specifications of wrongful appropriation, and six specifications of identity theft, in violation of Articles 92, 121, and 134, UCMJ, 10 U.S.C. §§ 892, 921, 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for 50 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

[*]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.

Before this Court, the appellant argues that her sentence is inappropriately severe. We disagree and, for the reasons discussed below, affirm the findings and sentence.

Background

The appellant worked as a customer support administrator in information management at the Air Force Operational Test and Evaluation Center. This position gave her access to social security numbers, birthdates, and other Personal Identifying Information (PII) of current and former Air Force members using a squadron roster. In 2010, the appellant took from the records social security numbers and other PII from unit members who had transferred to another duty station or who had retired. In addition, the appellant accessed a paid Internet site that gave her other information about the individuals, such as where they currently worked, their maiden or married name, and their mother's maiden name. The appellant used the victims' PII to apply for accounts and credit with various companies, such as cable and satellite television companies and credit card companies, to include Discover Card and Bank of America.

The appellant was originally charged with four specifications of larceny. She and the convening authority entered into a pretrial agreement that required her to plead guilty to two of those specifications as charged and to the lesser included offense of wrongful appropriation in a third larceny specification. The pretrial agreement provided that no more than 30 months of confinement would be approved. The appellant entered pleas as provided by the pretrial agreement. During the providence inquiry into Specification 1 of Charge III, however, the appellant stated that she always intended to repay the money she fraudulently obtained from Discover Card Services. During a discussion of how those statements affected the pretrial agreement, defense counsel indicated that the appellant would make similar statements regarding her intent as to the money she fraudulently obtained from Bank of America Visa, as alleged in Specification 2 of Charge III. The military judge obtained the parties' concurrence that, because he had to reject the plea of guilty to larceny as to those two specifications, the pretrial agreement no longer was in effect.

The military judge ultimately entered pleas of guilty on the appellant's behalf to wrongful appropriation for Specifications 1 and 2 of Charge III. The Government elected not to proceed on the greater larceny offenses. The military judge then found the appellant guilty of, among other offenses, the lesser included offense of wrongful appropriation under Specifications 1 and 2 of Charge III while finding her not guilty of larceny. The military judge sentenced the appellant to a dishonorable discharge, confinement for 50 months, and reduction to the E-1. The convening authority approved the sentence as adjudged.

Sentence Severity

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 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).

Additionally, "[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)). Sentence comparison is not required unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Id.* 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.*

The appellant argues that her sentence is too severe when compared to five military cases on identity theft she found on a legal research database. The appellant further argues that her sentence to 50 months of confinement exceeds the 30 month cap the convening authority had agreed to in the canceled pretrial agreement for offenses greater than those of which she was convicted. Finally, the appellant argues that her sentence to 50 months was greater than that proposed by the trial counsel in the sentencing argument, which was 4 years.

We decline the appellant's invitation to engage in sentence comparison. We are aware that we have the discretion to consider sentences in other courts-martial when reviewing a case for sentence appropriateness. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). The appellant asserts that the average amount of confinement approved in the five cases she cites to us was 30 months, far less than the 50 months she received in her case. We have reviewed these cases and find them unpersuasive. The facts and mix

of charges and specifications in those cases vary significantly from the facts and mix of charges and specifications in the appellant's case. The appellant has failed to show how these cases are in any way closely related to her case. They do not involve "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. As such, we find that sentence comparison is not warranted.

We also find the appellant's additional arguments to be without merit. Based on the appellant's statements during the providency inquiry, the military judge rejected the plea of guilty to the two larceny specifications, as contemplated in the pretrial agreement. This, in turn, nullified its terms, to include the confinement cap of 30 months. Trial counsel and defense counsel understood and concurred that the pretrial agreement was no longer viable, which increased the appellant's sentence exposure. We also note that the trial counsel's recommended sentence of four years of confinement was a legally permissible sentence and was only two months shy of the 50 months adjudged by the military judge.

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[s] and the character of the offender.'" *Snelling*, 14 M.J. at 268 (citation omitted). The appellant's criminal behavior was prejudicial to good order and discipline and discredited the Air Force, the unit, and the appellant herself. Most aggravating is the fact that the appellant, a non-commissioned officer, used her position as a customer support administrator to take and use the personal information of other Airmen for her own benefit. Two of the appellant's identity theft victims testified in sentencing. One victim, a retired master sergeant who had served with the appellant, described the experience as "an absolute nightmare," and expressed shock and anger when learning that another Airman had stolen her identity. Another victim, a former military member, testified how the appellant's actions affected her credit score negatively and impacted her ability to obtain the top secret security clearance she needed for her job. She was "disillusioned" and "disappointed" upon learning that an active duty military member had stolen her identity. 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 find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

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.

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court