UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class YEDEYCHEM MANN
United States Air Force

ACM 38124 (recon)

16 July 2013

Sentence adjudged 22 March 2012 by GCM convened at Travis Air Force Base, California. Military Judge: W. Shane Cohen.

Approved sentence: Bad-conduct discharge, confinement for 73 days; a fine of $2,775.00, and reduction to E-1.

Appellate Counsel for the Appellant: Major Tiwana L. Wright.

Appellate Counsel for the United States: Colonel Don M. Christensen; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

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

PER CURIAM:

The appellant pled guilty to one specification of conspiracy to steal military property of a value of more than $500.00 and one specification of stealing military property of a value of more than $500.00, in violation of Articles 81 and 121, UCMJ, 10 U.S.C. §§ 881, 921. He was sentenced to a bad-conduct discharge, confinement for 73 days, a fine of $2,775.00 and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

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[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.

Background

The appellant, a promising and well liked young Airman, and his co-conspirator, Airman First Class (A1C) R, teamed up with a civilian friend of theirs to steal an aerospace ground generator used to power military aircraft while being serviced. The generator was several years old, but the Air Force paid approximately $73,000 for it when it was new. The appellant had parked it in a parking lot on base several weeks before he and his friends stole it. They decided to steal it after observing no one had realized it was missing. The scheme was the appellant's idea. He wanted the generator because its diesel motor was one he thought could be installed in an old pickup truck he owned. Early one morning, the three friends decided to take the generator using A1C R's truck, hauling a trailer belonging to the civilian friend. The plan was to push the generator into the trailer and remove it from base.

At 0230 one morning, the three got into A1C R's truck with the appellant driving because A1C R had been drinking. They drove on base to where the generator was parked but, because of its size, could not fit it into the trailer. At this juncture, A1C R got into the back seat and passed out. The appellant parked the trailer in another parking lot, returned to the generator and simply hauled it off the base using the truck's trailer hitch. No one questioned him when he drove off the base. A1C R was passed out when the generator was removed from the base and only realized they had successfully taken it when he awoke the next morning. He eventually helped the appellant install the engine into the appellant's truck.

For his part of the scheme, A1C R was court-martialed for stealing military property of a value of more than $500.00. The convening authority approved the adjudged sentence of hard labor without confinement for 90 days, restriction to the limits of Travis Air Force base for 60 days, and reduction to the grade of E-2.

Sentence Appropriateness

The appellant claims his sentence is inappropriately severe, given the disparity between his sentence and his co-conspirator's, despite the closely related nature of their offenses.

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F 2005). 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). While our responsibility is to ensure that justice was done, it is not part of our function to exercise clemency. *See United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F 1999).

We "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.'" *See 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 appropriate if the cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. 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*. "[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*.

In light of the differences between the appellant and A1C R's involvement and benefit from the theft, also taking into account the appellant's individual circumstances, we do not conclude that his sentence was inappropriately severe compared to A1C R's sentence. First, even though there was a direct nexus between their two crimes, they did not face the same charges. The appellant was charged with and pled guilty to two offenses (conspiracy and theft) while A1C R was charged with and pled guilty to only one (theft). Second, their actions in carrying out the theft were highly disparate in that the appellant was the primary actor. It was the appellant who hatched the plan and prepositioned the generator weeks before the actual theft. He drove the vehicle on base, hooked it up to the truck, and then drove it off the base with the generator. While A1C R was a willing participant, the theft benefited only the appellant as it was he who received the motor and was able to install it in his truck. There was no evidence that A1C R was unjustly enriched at all. Indeed, when the time came, he was incapable of even carrying out the theft due to his intoxication. Finally, we note that the appellant received four letters of counseling and two letters of reprimand for the member's consideration during sentencing. Comparing the differences and similarities between the two cases, we believe a rational basis exists for the difference between the two sentences.

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.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court