UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class WILLIAM F. STONE
United States Air Force

ACM 35352

15 September 2004

Sentence adjudged 10 July 2002 by GCM convened at Aviano Air Base, Italy. Military Judge: Linda S. Murnane.

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Captain C. Taylor Smith, and Samantha Brock (legal intern).

Before

BRESLIN, JOHNSON, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

The appellant was convicted, in accordance with his pleas, of conspiracy to commit an assault consummated by a battery, assault consummated by a battery, and housebreaking, in violation of Articles 81, 128, and 130, UCMJ, 10 U.S.C. §§ 881, 928, 930. He was also convicted, contrary to his pleas, of wrongful distribution of four tablets of 3, 4 methylenedioxymethamphetamine (ecstasy), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Finally, he was found not guilty of two specifications of wrongful use of ecstasy and marijuana on divers occasions. The appellant was sentenced to a bad-

conduct discharge, confinement for 18 months, total forfeitures, and reduction to E-1. The convening authority approved the adjudged sentence.

The facts supporting the charges to which the appellant pled guilty are as follows. On 29 July 2001, at about 0400 in the morning, the appellant, Airman (Amn) Collins, and two other airmen were outside the appellant's dorm room, talking and drinking. Amn Kim, obviously awakened by the noise, opened the door and told them they were being too loud. The appellant and the others were "a little aggravated" by this, since Amn Kim was "always calling the Security Forces on them." The appellant and Amn Collins then agreed to "jump" Amn Kim. They went to Amn Collins' room to retrieve two ski masks, and returned to Amn Kim's room. When Amn Kim opened the door, Amn Collins and the appellant each grabbed him by one arm in an attempt to pull him outside. Amn Kim's resistance led the others to instead push him inside, whereupon Amn Kim struck his head on a bedpost. His assailants then left. The victim did not suffer significant injuries; the record reveals that he played golf and lifted weights the next day.

The government produced testimony from Amn Collins and Amn Gabriel on the charge of wrongful distribution of ecstasy. Amn Gabriel was the appellant's roommate, and was also an informant with the Air Force Office of Special Investigations (AFOSI). The evidence demonstrated that Amn Gabriel asked the appellant for ecstasy. The appellant obtained four tablets of ecstasy from Amn Collins, and sold them to Amn Gabriel for $50. The appellant returned all proceeds to Amn Collins.[1]

The appellant urges this Court to grant him sentencing relief. He argues that his sentence is inappropriately severe relative to the nature of his offenses and the sentence received by his co-actor, Amn Collins. He asks us to compare his sentence to that received by Amn Collins, which was a bad-conduct discharge, confinement for 15 months, total forfeitures, and reduction to E-1. The convening authority approved the sentence as adjudged, but reduced the confinement to 13 months.

This Court may affirm only such findings of guilty and the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). In order to determine the appropriateness of the sentence, this Court must consider 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 (C.M.A. 1982). The consideration of a grant of clemency, or mercy, is a separate analysis, not part of the Court's charter. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

[1] For purposes of completeness of discussion, we note that the record and inferences to be drawn therefrom did not raise the defense of entrapment.

In this case, the appellant argues that this Court can execute its Article 66(c), UCMJ, responsibility only by comparing his sentence to that of his co-actor, Amn Collins. The Court of Appeals for the Armed Forces has acknowledged, however, that the sentence review function of the Courts of Criminal Appeals is highly discretionary, and has not required service courts to "engage in sentence comparison with specific cases 'except 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. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)).

There is a three-part analysis to undertake when engaging in sentence comparison: (1) whether the cases are "closely related," (2) whether the sentences are "highly disparate," and (3) whether there is a rational basis for the disparity. *Lacy*, 50 M.J. at 288. To be closely related, there must be a nexus between the two cases, such as "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.* In determining whether the sentences are "highly disparate," we are not limited to "a narrow comparison of the relative numerical values of the sentences at issue, but also may include consideration of the disparity in relation to the potential maximum punishment." *Id.* at 289. The appellant bears the burden of demonstrating that his sentence and the sentence to be compared are closely related, and are highly disparate. Assuming that burden is met, the burden shifts to the government to show there is a rational basis for the disparity.

The appellant was sentenced to a bad-conduct discharge, confinement for 18 months, total forfeitures, and reduction to E-1. He urges comparison of his sentence to that of Amn Collins. Amn Collins was sentenced to a bad-conduct discharge, confinement for 15 months, total forfeitures, and reduction to E-1. Amn Collins had negotiated a pretrial agreement with the convening authority, under which the convening authority had agreed to disapprove confinement in excess of 2 years. The convening authority granted clemency in the action on Amn Collins' case, disapproving 2 months of the adjudged confinement period. In order to conduct the analysis in this case, it is necessary to discuss briefly the charges in both cases.

Amn Collins was the co-actor throughout the charges involving Amn Kim (Charges I, III, IV). While the record indicates that Amn Collins suggested the use of and provided the ski masks, and was the first to grab Amn Kim, assaulting and then battering him, the degree of complicity in these crimes is relatively indistinguishable. The appellant's statements made during the *Care*[2] inquiry suggest at least a simultaneous agreement between the two to assault Amn Kim. Amn Collins' *Care* inquiry statement

[2] *United States v. Care*, 40 C.M.R 247 (C.M.A. 1969).

indicates that it was the appellant's suggestion to "jump" Amn Kim, to which he readily agreed.

As to the offenses under Article 112a, UCMJ, the appellant was convicted, contrary to his plea, of distribution of four tablets of ecstasy. The tablets were provided by Amn Collins to the appellant, and were distributed by him to Amn Gabriel, who was working as an undercover operative for the AFOSI. Amn Gabriel paid $50 for the four tablets. All proceeds from this sale were returned to Amn Collins. Amn Collins, on the other hand, pleaded guilty to distribution of 12 tablets of ecstasy. He brought the tablets onto Aviano Air Base (AB), Italy, and distributed them to Amn Gabriel. Amn Gabriel, again working undercover, had agreed that the base price was $12 per tablet, and understood that they could be sold for as much as $20 per tablet. The base price was to be repaid to Amn Collins, thereby allowing a profit margin for the "retail seller". The next day, Amn Gabriel gave Amn Collins $240 for all 12 tablets. Amn Collins kept all the proceeds. Comparing their culpability on the distribution specifications, it is fair to say that Amn Collins "sponsored" the distribution opportunities—to both Amn Gabriel and to the appellant. But the appellant actually distributed as well, the only difference being 4, as opposed to 12 (charged), tablets. Another distinguishing factor between them, however, is that Amn Collins pleaded guilty to this offense; whereas the appellant was found guilty by a court composed of officer and enlisted members.

Amn Collins' tally on the conviction list, however, continues on, while that of the appellant holds firm. In addition to pleading guilty to wrongful introduction onto the installation, with intent to distribute the 12 ecstasy tablets, as discussed above, Amn Collins also pleaded guilty to charges of wrongful use of oxycodone, a Schedule II controlled substance, in violation of Article 112a, UCMJ. He also pleaded guilty to dereliction of duty, driving while intoxicated, and a single use of ecstasy, in violation of Articles 92, 111, and 112a, UCMJ, 10 U.S.C. §§ 892, 911, 912a. The facts as to the charge of dereliction of duty are noteworthy. While Amn Collins was under investigation for his offenses, he was relieved of his normal duties. He was detailed as a security escort officer, which required him to travel in Italian contractors' vehicles that frequently entered and exited Aviano AB. The purpose of this duty was to spare limited Security Forces staff the burden of searching every entering vehicle, in the post 11 September 2001 environment. The duty involved staying alert, observing anyone or anything coming into contact with the vehicle while off base, and reporting unusual activity to the gate guards upon the vehicle's return to the base. Amn Collins was found asleep during those duties on the morning of 21 February 2002. To round out the comparison between the appellant and Amn Collins, it should be recalled that the appellant was acquitted of divers uses of ecstasy and marijuana.

The appellant calls upon us to compare the cases in aggravation for each member, specifically, that the appellant had no prior disciplinary history, whereas Amn Collins had received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for assault

upon another airman, and two letters of counseling. He also testified, though under a grant of immunity, to far greater criminal activity with respect to drug use than he was charged or convicted. The appellant also suggests that his character statements in extenuation and mitigation were stronger in nature than those of Amn Collins. The government provides that Amn Collins pleaded guilty before a military judge sitting alone, and cooperated with the government by providing leads to ecstasy use in the area.

Turning to the application of the law to these facts, we find that the appellant has met his burden of establishing that his offenses are closely related to those committed by Amn Collins. There clearly is a direct nexus between the two, as co-actors, as to the charges of assault consummated by a battery, conspiracy, and housebreaking. As to the distribution offense, we think it is fair to say these are also closely related, in that Amn Collins and the appellant were servicemembers involved in a common or parallel scheme, if not outright co-actors.

However, we find that the appellant has failed to establish his burden with respect to the sentences being highly disparate. The sentences range in difference by only 3 months. The convening authority granted Amn Collins clemency and disapproved 2 of his 15 months of confinement. In determining whether the sentences are "highly disparate," we may also consider the disparity in relation to the potential maximum punishment. In this case, the maximum punishment for the appellant was a dishonorable discharge, confinement for 21 years, total forfeitures, and reduction to E-1. For Amn Collins, the maximum period of confinement was 46 years, 9 months. He entered into a pretrial agreement with the convening authority, under which the maximum confinement he could receive was 2 years.

Admittedly, the trouble with this case is that the co-actor objectively appears more culpable in terms of the charges and the findings. He is, in fact, "more guilty" because his criminal behavior was simply more widespread.[3] Still, sentencing under the Uniform Code of Military Justice is not derived with mathematical certainty, but is instead an analysis of a variety of factors, sometimes competing factors, and the co-actor's more extensive criminal activity in this case is but one factor we consider. *See United States v.*

[3] The difference in maximum punishments is due to true behavior, as opposed to simple prosecutorial discretion. Compare this case to the facts in *United States v. Durant*, 55 M.J. 258 (C.A.A.F. 2001), where the comparator received arguably less punishment (reduction to E-3 and fine of $4,200, no confinement, no discharge, compared to appellant's sentence of dishonorable discharge, 30 months of confinement, and reduction to E-1, with the convening authority approving only a bad-conduct discharge, 12 months of confinement, and reduction to E-1, pursuant to a pretrial agreement), though was subject to confinement four times in length due to prosecutorial discretion with respect to charging. In the end, the comparator's actual culpability was slightly less than the appellant in that case (value of goods received through unlawful use of government IMPAC card was about 1/3 less).

Olinger, 12 M.J. 458, 461 (C.M.A. 1982); *United States v. Judd*, 28 C.M.R. 388, 394 (C.M.A. 1960).[4]

In the end, the sentence of each appellant appears within the range of "uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *Lacy*, 50 M.J. at 287-88). As a result, we cannot say that comparing them, as we do for purposes of this analysis, causes us to in any way see the three-month difference in confinement as "highly disparate," even when the co-actor is guilty of more offenses. The Court of Appeals for the Armed Forces has acknowledged that "the military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military accused is sentenced as an individual." *Durant*, 55 M.J. at 261.[5]

Our analysis of the cases reveals that in many instances, the question of what is highly disparate is often answered with factors the government would argue as providing a rational basis for the disparity. So, too, shall we provide the rational bases by which we distinguish these two cases:

- The co-actor pled guilty.
- The co-actor was sentenced by a military judge.
- The co-actor had a negotiated pretrial agreement with a cap of two years.
- The convening authority granted the co-actor clemency.
- The co-actor provided investigative assistance into criminal activity in the local area.
- The uncharged misconduct disclosed during testimony under a grant of immunity is irrelevant to this analysis, as it was not before Amn Collins' military judge.

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[4] While concurring in the result in *Judd*, 28 C.M.R. at 394, Judge Ferguson said:

> I am certain that mathematical calculation is not the type of uniformity which Congress deemed desirable. It seems more likely to me that it was envisioned that members would utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding accused's delict, his sentence was appropriate. In short, it was hoped to attain *relative* uniformity rather than an arithmetically averaged sentence.

[5] And we say that we base our decision on a three-month spread, because clemency relief from the convening authority, pursuant to his unfettered discretion to grant the same, is not part of the analysis. Relatively equal adjudged sentences do not become disparate because the convening authority grants relief for one and not another. Our responsibility in this Court is to determine sentence appropriateness without regard to grants of clemency by the convening authority. *See United States v. Stotler*, 55 M.J. 610, 612 (N.M. Ct. Crim. App. 2001); *United States. v. Kelly*, 40 M.J. 558, 570 (N.M. Ct. Crim. App. 1994).

- Even though the numerical value of the charges is greater, the co-actor's overall criminal enterprise is not that much greater, save for the driving under the influence and dereliction of duty charges, both of which would be the subject of nonjudicial punishment but for the investigation already underway. Four versus twelve tablets of ecstasy does not trouble us. Additional charges of a single use of ecstasy, and a single use of oxycodone is obviously stepping up the criminal culpability, but then again, in light of the other factors, it does not.

Having compared and analyzed the two cases, and considering all the circumstances of the appellant's offenses, in light of his military record and the matters contained in the record of trial, we find the sentence to be appropriate. The appellant is entitled to have a sentence that ensures justice is done and that he has received a punishment he deserves. *Healy*. There is nothing in the record we see that causes us to believe this sentence does not comport with that standard.

The approved findings and 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 approved findings and sentence

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court