UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant STEVEN C. WALKER
United States Air Force

ACM 37914

25 October 2012

Sentence adjudged 28 January 2011 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: W. Shane Cohen.

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

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

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was tried by a general court-martial comprised of officer and enlisted members at Seymour Johnson Air Force Base, North Carolina, between 26-28 January 2010. Contrary to the appellant's pleas, the panel convicted him, inter alia, of one specification of wrongful distribution of cocaine and one specification of wrongful distribution of Hydrocodone, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The panel sentenced the appellant to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved only so much of the sentence as provided for a bad-

[1] The appellant was found not guilty of one specification of wrongful possession of cocaine and one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912(a).

conduct discharge, confinement for 18 months, and reduction to E-1. Before this Court, the appellant raises two assignments of error: (1) the military judge erred by failing to dismiss the charge and specifications sua sponte because of the destruction of evidence essential to putting on the defense of entrapment [2] and (2) the appellant's sentence, which included a punitive discharge, is inappropriately severe considering the circumstances and disparate sentences of a co-actor.[3] We disagree. Finding no prejudicial error, we affirm the findings and the sentence.

Background

In April 2009, DG, a dependent spouse, became a confidential source for the Air Force Office of Special Investigations (AFOSI) as part of their investigation into the appellant's purported drug use and distribution. Special Agent (Agent) SP ensured DG received confidential source training in, among other areas, entrapment so that she would know how to interact with the appellant. As a confidential source, DG arranged controlled drug buys with the appellant. In July 2009, DG notified Agent SP that the appellant offered to provide her with prescription pills. DG purchased the pills from the appellant at an on-base location. In mid-July 2009, DG notified Agent SP that the appellant offered to get her some cocaine. Agent SP gave DG money to buy the cocaine from the appellant; DG met the appellant at an on-base location, gave him the money, and received the cocaine. A second transaction between DG and the appellant took place in late July 2009 at an on-base location, followed by yet another in August 2009 at an off-base location.[4]

Agent SP provided DG with a cell phone so that she could communicate with the appellant via telephone calls or text messages. On occasion, the cell phone memory would "fill up" with text messages between DG and the appellant such that DG would need to delete some messages to free up memory. DG testified she coordinated with Agent SP before deleting any text messages, who instructed her to delete only minor messages, such as "Hi," "Hey, how are you," and messages that did not relate to any of the potential controlled drug buys between DG and the appellant. When DG finished her duties as a confidential source, Agent SP took the cell phone from DG as evidence and prepared a log of the messages. The log showed that the cell phone did not contain any "sent" messages between DG and the appellant, indicating that DG had deleted those messages. Agent SP sent the phone to the Defense Criminal Forensic Laboratory (DCFL) for analysis. The DCFL retrieved existing text messages from the cell phone but

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[2] The appellant has raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] The appellant has raised this issue pursuant to *Grostefon*.
[4] Prior to each transaction, Special Agent (Agent) SP met DG at a pre-disclosed location, where she searched DG and her car. Under observation by the Air Force Office of Special Investigations (AFOSI), DG met with the appellant and bought the drugs. Afterwards, Agent SP met with DG at a pre-disclosed location, where she again searched DG and her car. Upon finding the drugs, Agent SP placed them in a plastic bag, which DG initialed. Agent SP then logged the drugs into evidence for further testing. DG also prepared a written statement for AFOSI after each controlled buy.

was unable to extract any previously deleted data because its software did not support that function.

Trial defense counsel filed a pre-trial motion to compel production of a defense expert consultant to analyze the cell phone and retrieve the deleted data.[5] Trial counsel argued that such an expert was unnecessary because the prosecution did not intend to use a DCFL expert at trial, did not intend to introduce the substance of the text messages through Agent SP, and proffered that Agent SP would only testify that AFOSI gave DG the cell phone so she could communicate with the appellant. The military judge denied the motion, ruling that the defense failed to show anything more than a "mere possibility"[6] that the expert would provide meaningful assistance to the defense in the preparation of its case. Trial defense counsel did not raise an entrapment defense prior to trial. Defense counsel did, however, raise the defense during the course of trial by asserting that the appellant was sexually attracted to DG, which motivated him to provide her drugs. The military judge allowed the Government to present evidence of the appellant's predisposition to distribute drugs. The military judge also instructed the members on entrapment. The appellant now asserts that the missing text messages were central to the presentation of his entrapment defense.

Destruction of Evidence

In his first assignment of error, the appellant asserts that the military judge erred by not dismissing sua sponte the charge and specifications because of the destruction of evidence essential to putting on his defense of entrapment. The appellant failed to object at trial; thus, we review this issue for "plain error." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the appellant. *Id*.

This court reviews claims of improper loss or destruction of evidence de novo. *United States v. Blaney*, 50 M.J. 533, 543 (A.F. Ct. Crim. App. 1999).

> Destruction of, or failure to preserve, evidence does not entitle an appellant to relief on due process grounds unless . . . (1) the evidence possesses an exculpatory value that was apparent before it was destroyed; (2) it is of such a nature that the accused would be unable to obtain comparable evidence by other reasonably available means; and (3) the Government [acted] in bad faith.

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[5] Trial defense counsel initially requested that the convening authority appoint a confidential expert consultant on 30 December 2011. The staff judge advocate for the convening authority denied this motion on 20 January 2011.

[6] In his ruling on the motion, the military judge quoted from and cited to *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008).

Id. (citing *California v. Trombetta*, 467 U.S. 479, 488-89 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). *See also United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008); *United States v. Bohl*, 25 F.3d 904, 909-10 (10th Cir. 1994). To establish an Article 46, UCMJ, 10 U.S.C. § 846, discovery violation, the appellant must make the same showing. *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986) (holding that the rule announced in *Trombetta* satisfies both constitutional and military standards of due process and should therefore be applicable to courts-martial).[7] *See also United States v. Manuel*, 43 M.J. 282, 288 (C.A.A.F. 1995). Finally, to be entitled to relief under Rule for Courts-Martial (R.C.M.) 703(f), the appellant must show that (1) the evidence is "relevant and necessary"; (2) it is "destroyed, lost, or otherwise not subject to compulsory process"; (3) it is "of such central importance to an issue that it is essential to a fair trial"; (4) there is "no adequate substitute for such evidence"; and (5) the appellant is not at fault or could not have prevented the unavailability of the evidence. R.C.M. 703(f)(1), (2).

We have reviewed the record and find that the appellant has not met the requirements of the *Trombetta* test or R.C.M. 703(f). The record fails to show that the exculpatory nature of the deleted text messages evidence was apparent before they were destroyed or that the Government acted bad faith. DG testified that she only deleted minor messages between her and the appellant, as instructed by Agent SP. In so doing, she also deleted all of the messages she sent the appellant. Regardless, there is no evidence that the exculpatory nature of the text messages was apparent before they were deleted, or that DG and Agent SP acted in bad faith. Likewise, the appellant has not shown how the text messages were of such central importance as to be essential to a fair trial or that an adequate substitute for those messages did not exist. R.C.M. 703(f). On this point, we note that alternative forms of evidence existed to substitute for the text messages via the testimony of DG and, to a lesser extent, the testimony of Agent SP. We are convinced that the absence of the deleted text messages did not impact the ability of the appellant to present his entrapment defense. As such, we find that the military judge did not err in failing to dismiss the charge and specifications sua sponte.

Sentence Severity

In his second assignment of error, the appellant asserts that his sentence, which included a bad-conduct discharge, was inappropriately severe when compared to the circumstances and disparate sentence of his co-actor, Airman Basic (AB) TJ. We disagree.

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),

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[7] We will refer to the tests outlined in *California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988); and Article 46, UCMJ, 10 U.S.C. § 846, as the *Trombetta* test.

UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *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) (quoting the lower court's unpublished opinion)). 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." *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.*

When considering disparity, we may consider the difference between the actual and maximum potential sentences. *Id.* at 289. The maximum possible punishment in this case was a dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge, confinement for 18 months, and reduction to E-1. He asserts this sentence is too severe when compared to the sentence received by AB TJ. AB TJ pled guilty, pursuant to a plea trial agreement (PTA), to wrongful distribution and possession of cocaine and wrongful use of marijuana. The maximum possible punishment he faced for his offenses was a dishonorable discharge, confinement for 22 years, forfeiture of all pay and allowances, and reduction to E-1. He received a bad-conduct discharge, confinement for 13 months, and reduction to E-1. The PTA capped confinement at 14 months. The appellant, like AB TJ, received far less than the maximum punishment he faced. This factor weighs against the appellant in the "highly disparate" analysis. *Id.* at 289. *See also United States v. Anderson*, 67 M.J. 703, 706-07 (A.F. Ct. Crim. App. 2009). Finally, we note that AB TJ's sentence resulted from him entering into a PTA with the convening authority, by which terms he pled guilty, thus saving the government the time and expense of prosecuting his case. This factor "meets the low threshold of establishing a rational basis for any disparity. *Anderson*, 67 M.J. at 707.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court