UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic TYLER W. WEST
United States Air Force

ACM 34520

18 July 2002

Sentence adjudged by GCM convened at Schriever Air Force Base, Colorado. Military Judge: Kurt R. Schuman.

Approved sentence: Dishonorable discharge, confinement for 5 years, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Lieutenant Colonel Timothy W. Murphy, Major Jeffrey A. Vires, and Captain Shelly W. Schools

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, Major Eric D. Placke, and Major Cheryl D. Lewis.

Before

YOUNG, PECINOVSKY, and STUCKY
Appellate Military Judges

OPINION OF THE COURT

STUCKY, Judge:

Airman Basic (AB) Tyler W. West was convicted, pursuant to his pleas of guilty, and by a general court-martial with members, of two specifications of conspiracy in violation of Article 81, UCMJ, 10 U.S.C. § 881; one specification of willful destruction of military property of the United States of a value of more than $100, in violation of Article 108, UCMJ, 10 U.S.C. § 908; eight specifications of larceny in violation of Article 121, UCMJ, 10 U.S.C. § 921 (one of military property of the United States of a value of less than $100, five of personal property of a value of more than $100, and two of personal property of a value of less than $100); one specification of burglary in violation of Article 129, UCMJ, 10 U.S.C. § 929; and one specification of housebreaking

in violation of Article 130, UCMJ, 10 U.S.C. § 930. He was sentenced to a dishonorable discharge, 6 years' confinement, and forfeiture of all pay and allowances. The convening authority approved so much of the sentence as provided for a dishonorable discharge, 5 years' confinement, and forfeiture of all pay and allowances.

AB West alleges two errors. First, he maintains that his approved sentence is inappropriately severe in light of that given a co-actor in the affair, Airman (Amn) Prince Goodridge. Second, he contends that he was prejudiced by an improper sentencing argument by the trial counsel, who called him a "lying thief" and misstated evidence.

I.

On 22 February 2002, nearly six months after joinder of this case, appellate defense counsel filed a motion to file supplemental assignment of error and to submit documents. The supplemental assignment of error alleges that AB West was subjected to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution by reason of the confinement facility's deliberate indifference to his serious medical condition. The government has filed an opposition to these motions. We grant the motions and will consider the arguments of the appellant herein.

The appellant's court-martial grew out of a crime spree in which he engaged with Amn Goodridge at Peterson Air Force Base, Colorado, between 30 September and 18 November 2000. The two conspired to commit a series of barracks larcenies, with one airman entering the room while the other acted as lookout. The items stolen, in addition to currency and change, included two Sega Dreamcasts, a DVD player, a video camera, a case containing DVD movies, a VCR, contact lenses, and video games. In furtherance of the conspiracy, the two also broke into the dorm manager's office, destroying the door, in order to steal a ring of master keys, which gave them access to the rooms in the dorm. When the master keys were not used, one of the two gained entrance to the room by opening a window from the outside and then opening the door from the inside of the room to admit the other. In one instance, the appellant invited his roommate, Amn Singh, who happened to be passing by, to participate in a larceny by receiving a video camera, which he and Amn Goodridge were taking from another airman's room.

II.

The long-established rule on sentence comparison in courts-martial is that the sentencing authority shall impose an appropriate sentence for the particular accused, based upon individualized consideration of that accused, taking into account the nature and seriousness of the offense and the character of the offender. Court members are not to be given sentences in other cases for comparative purposes. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959).

This Court has a duty to affirm only so much of 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). Our review of the appropriateness of a sentence is highly discretionary and based on our experience with "the range of punishments typically meted out in courts-martial." *United States v. Lacy*, 50 M.J. 286, 288 (1999) (quoting *United States v. Ballard*, 20 M.J. 282, 286 (C.M.A. 1985)). However, we are "required . . . 'to engage in sentence comparison with *specific cases* . . . 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. Wacha*, 55 M.J. 266, 267 (2001) (emphasis in original) (quoting *Lacy*, 50 M.J. at 288 (quoting *Ballard*, 20 M.J. at 283)). To establish that principle, the appellant must meet a three-pronged test. First, the offenses and the offenders must be directly related, rather than as, e.g., independent actors with relations to a common third party. Second, the sentences must indeed be "highly disparate." And finally, there must be no "rational basis" for the differences between the sentences. *Lacy*, 50 M.J. at 288.

The appellant argues that the sentence given to him and the sentence given to Amn Goodridge meet this test, and that a comparison of them compels the conclusion that his was inappropriately severe. Amn Goodridge was convicted of several of the same larcenies—those involving personal property of Airmen Kugler, Segovia, Garrett, Campos, and Hubley—but was not convicted of the larcenies of the property of Airmen Carr and Bishop, of which the appellant was convicted. Amn Goodridge was convicted of conspiracy to destroy the door and steal the master keys, as was the appellant, but was not convicted of the separate offenses of larceny of government property (the keys) and the willful destruction of government property (the door). Amn Goodridge was also convicted of four drug offenses involving marijuana, LSD, and ecstasy, which did not involve the appellant. Amn Goodridge was sentenced to a bad-conduct discharge, 3 years' confinement, total forfeitures, and reduction from E-2 to E-1. The convening authority reduced the confinement to 33 months and otherwise approved the sentence. The appellant, who was an E-1 at the time of his court-martial, was sentenced to a dishonorable discharge, 6 years' confinement, and total forfeitures. The convening authority reduced his confinement to 5 years and otherwise approved the sentence.

It appears that the total authorized punishment for the offenses of which Amn Goodridge was convicted was a dishonorable discharge, 91 years' confinement, total forfeitures, and reduction to E-1, while for the appellant it was a dishonorable discharge, 72 years' confinement, and total forfeitures. In Amn Goodridge's case, 30 years of the total were attributable to the drug offenses, leaving 61 years for the offenses that might be said to be the result of the instant conspiracy.

We find that the appellant failed to establish that his case was closely related to that of Amn Goodridge or that the sentences were disparate. The offenses were not closely related—both offenders were tried and convicted of offenses the other was not.

The sentences are not highly disparate when considering the "the disparity in relation to the potential maximum punishment." *Lacy*, 50 M.J. at 289. Furthermore, there seems to be compelling reasons for the difference in sentences. The appellant had a letter of reprimand (LOR) for failure to obey an order and failure to go, two Article 15s for breaking restriction and violating a no-contact order, and a civilian felony conviction for inducing a minor to steal an automobile. By contrast, while Amn Goodridge was not a model airman, his prior involvements were minor. He had four LORs for failure to go and a letter of counseling for violating a local noise ordinance. Moreover, the appellant instructed his counsel to argue for a punitive discharge (without specifying which kind) in the hope of getting reduced confinement. No such tactic was employed in Amn Goodridge's case.

After considering the entire record and employing our experience in the military justice system, we are convinced the appellant's sentence is appropriate.

III.

The appellant's second contention is that he was materially prejudiced by improper sentencing argument by the trial counsel. Specifically, he cites trial counsel's implication that he knew Airman First Class (A1C) Garrett, one of the victims; his statement that the appellant personally stole some contact lenses from Amn Carr, as opposed to serving as lookout while Amn Goodridge stole them; and his statement that the appellant "got others involved" in crime and "maybe even made criminals out of people who [otherwise] wouldn't be criminals." He further cites an exchange in which the trial counsel misstated the evidence, stating that one of the appellant's Article 15s was for a false official statement, when it was actually for breaking restriction, and referring to the appellant as a "lying thief."

At the outset, we must differentiate between the first three statements cited and the last, because the defense did not object to the first three but did to the last. Absent plain error, the failure to object to improper sentencing argument waives the error. Rule for Courts-Martial (R.C.M.) 1001(g); *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992). Plain error is error that is plain or obvious and that materially prejudices a substantial right of the accused. *United States v. Powell*, 49 M.J. 460, 466 (1998). The burden of showing plain error is on the appellant. *United States v. Cardreon*, 52 M.J. 213, 216 (1999); *United States v. Guthrie*, 53 M.J. 103, 106 (2000).

With respect to at least two of the first three statements, the appellant has not even met his burden of showing error, much less plain error. The trial counsel's statement as to A1C Garrett was supported by A1C Garrett's testimony that she had served as bay orderly with him. The trial counsel's statement as to the appellant's getting others involved in crime had ample basis in the evidence, both with regard to his civilian conviction for inducing a minor to steal a car and his inviting his roommate, Amn Singh,

to join in a theft that he and Amn Goodridge were committing. With respect to the statement about the contact lenses, the appellant admitted that he stood lookout while Amn Goodridge rifled the room in question. While it may have been erroneous to imply that he personally took the lenses, the distinction hardly rises to the level of plain error. The fact that the appellant received a 6-year sentence (later reduced to 5) when the authorized confinement was 72 years negates any possibility of prejudice. *United States v. Baer*, 53 M.J. 235, 238 (2000).

The statement regarding the Article 15 stands on a different level, since this was preserved on appeal. At the outset, no argument is made that the trial counsel intentionally misled the military judge as to the content of the Article 15. On the other hand, we do not accept the government's implication that, having objected and been overruled, the defense counsel somehow had a duty to go behind the trial counsel's factual assertion. While the statement was clearly erroneous, the appellant must still show that he was materially prejudiced by it before we grant relief. Article 59(a), UCMJ, 10 U.S.C. § 859(a). He has not done so. As noted above, the appellant received less than one-twelfth the confinement authorized for the offenses of which he was convicted. Given that fact, and the significant negative information that was properly before the members for sentencing, we cannot find that the appellant's rights were materially prejudiced. *Baer*, 52 M.J. at 238*; United States v. Ramos*, 42 M.J. 392 (1995).

IV.

The appellant's third assignment of error is that his treatment in post-trial confinement violates the Eighth Amendment to the Constitution. It appears that the appellant, while in post-trial confinement at the Naval Brig in Charleston, South Carolina, developed abdominal pain that became acute in August 2001. After approximately two and one-half weeks of consultation and treatment by Navy personnel, he was taken to a civilian medical center where an emergency appendectomy was performed because of a ruptured appendix. After the operation, he was diagnosed with Crohn's Disease, a chronic intestinal condition. Approximately five months after the surgery, he was again hospitalized because of post-surgical complications. In his affidavit, he complains of continuing pain and states that he can no longer play sports "at the level I use (sic) to." He also complains of a "large unattractive scar now on my stomach, which also hurts when stretched or jumping." He alleges that, prior to the emergency surgery, the medical personnel at the brig "mocked" him, telling him that he was malingering and that he did not need to see a physician.

It is settled that the Constitution and the Uniform Code of Military Justice protect military prisoners from cruel and unusual punishment. *United States v. Avila*, 53 M.J. 99, 101 (2000); Article 55, UCMJ, 10 U.S.C. § 855. These protections apply to post-trial as well as pre-trial punishment. *United States v. Fulton*, 52 M.J. 767, 770 (A.F. Ct. Crim. App. 2000), *aff'd.*, 55 M.J. 88 (2001). The deprivation of medical treatment to a prisoner

may constitute cruel and unusual punishment under the Eighth Amendment. *Estelle v. Gamble,* 429 U.S. 97 (1976).

Nevertheless, a prisoner who alleges cruel and unconstitutional post-trial punishment has a substantial burden to carry. With respect to medical care, the standard is one of "deliberate indifference to serious medical needs." *Id.* at 104. First, the deprivation alleged must be "objectively, 'sufficiently serious,'" to deny "the minimal civilized measure of life's necessities." Second, the prison officials must have a "sufficiently culpable state of mind," which in prison conditions cases is one of "deliberate indifference" to the prisoner's health. *Farmer v. Brennan,* 511 U.S. 825, 834 (1994). In addition, a prisoner must exhaust his administrative remedies under the prison's grievance system and under Article 138, UCMJ, 10 U.S.C. § 938, before seeking judicial relief, absent some unusual or egregious circumstance. *United States v. Miller,* 46 M.J. 248 (1997); *United States v. Coffey,* 38 M.J. 290 (C.M.A. 1993); *Walker v. Commanding Officer*, 41 C.M.R. 247 (C.M.A. 1970).

At the outset, it is clear that the appellant has not exhausted his administrative remedies in the Charleston Navy Brig. His sole attempt at doing so appears to have been a meeting with the commanding officer of the brig in October 2001—a meeting of which the appellant states, "I did not ask for this meeting, but I did go." His account of the meeting implies that the commanding officer was open to his situation and promised to look into the matter. He closes by stating that he had yet to see any action on the commanding officer's part. There is nothing in the appellant's submission concerning the administrative procedures available at the brig for such prisoner complaints, much less any indication that he availed himself of them. Going, unwillingly, to a meeting with the commanding officer two months after the events in question hardly qualifies as a good-faith effort to use the system. There is no indication of any complaint filed pursuant to Article 138, UCMJ. Finally, the appellant has not even attempted to show that some unusual or egregious circumstance existed which would excuse his failure to exhaust his remedies. It follows that he is entitled to no relief.[1]

Even if we accept the meeting with the commanding officer as constituting an exhaustion of the appellant's administrative remedies, he has not come close to meeting the standard for an Eighth Amendment or Article 55, UCMJ, violation. Indeed, his own submissions belie his contention. He was seen by Navy corpsmen on eight occasions, one of which was for an unrelated condition, between 7 August and 19 August 2001, and had emergency surgery on 24 August. The medical records submitted show neither denial of "minimal civilized . . . necessities" nor "deliberate indifference" to the appellant's condition. A physician was consulted concerning his condition. Medication was prescribed on four different occasions. The appellant was placed on light duty and

[1] The fact that the appellant's father has filed a complaint with the Air Force Inspector General does not excuse his noncompliance with these requirements.

then on quarters. Tests were twice ordered. He was placed on a clear liquid diet. At the last appointment before his appendectomy he was given a follow-up appointment the next day, which he evidently did not keep.

Far from being "deliberately indifferent" to the appellant's medical condition, the prison officials appear to have dealt with it in a reasonable and responsible manner. The fact that their diagnosis may not have been correct might, in some civilian circles, give rise to liability for negligence, but it comes nowhere close to meeting the constitutional standard.[2]

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), UCM.J.; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court

[2] Accepting as true the appellant's allegations that the corpsmen "mocked" him as a malingerer, there is no indication that this in any way interfered with the care he received. While we do not condone such actions, they do not rise to any constitutional dimension on the facts as presented.