

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**James P. CASEY
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200600552

Decided 27 December 2006

Sentence adjudged 12 August 2005. Military Judge: C.C. Hale. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Aircraft Group 18, 1st Marine Aircraft Wing, Okinawa, Japan.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USN, Appellate Government Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of three specifications of larceny and one specification of wrongful appropriation, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for 150 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, pursuant to a pretrial agreement, deferred all automatic forfeitures from the date that the forfeitures would become effective under Article 58b(a)(1), UCMJ, until the date of the convening authority's action and, furthermore, waived all automatic forfeitures for six months from the date of his action.

The appellant alleges three assignments of error. First, he contends that his sentence is highly disparate as compared to the sentences received by Private First Class (PFC) White and Lance Corporal (LCpl) Holley, two alleged co-actors. Second, he

alleges that this court erred in denying his motion to compel the production of the summary courts-martial records of the two alleged co-actors. The appellant contends that this error precluded this court's ability to conduct an appropriate sentence disparity review. Third, he asserts that the sentence, including an unsuspended bad-conduct discharge, is inappropriately severe under the circumstances.

We have examined the record of trial, the appellant's three assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that there was no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Facts

On 19 August 2004, the appellant wrongfully appropriated a Marine Corps officer's Bank of America Visa debit card, which he found inside an automated teller machine (ATM) at a Bank of America located at Camp Humphreys, South Korea. He immediately used the card twice to steal \$40 and \$200 from the ATM machine. Additionally, between 19 August 2004 and 13 January 2005, he wrongfully used the card on three occasions to steal merchandise from both on-post and off-base commercial establishments.

Court's Failure to Compel Production of Documents

We will initially address the appellant's second assignment of error, since it is directly related to our decision concerning his first assignment of error. The appellant alleges that this court erred in denying his motion to compel the summary courts-martial records of PFC White and LCpl Holley. We disagree.

When addressing a post-trial dispute over discovery related to an appeal, our superior court has instructed us to conduct an analysis similar to that articulated in *United States v. Lewis*, 42 M.J. 1 (C.A.A.F. 1995). *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). Initially, an appellate court "must determine whether the appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted." *Id.* In making this determination, an appellate court should, at a minimum, consider the following:

- (1) whether the defense has made a colorable showing that the evidence or information exists;
- (2) whether or not the evidence or information sought was previously discoverable with due diligence;
- (3) whether the putative information is relevant to the appellant's asserted claim or defense; and

- (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

Id. at 138.

We hold that the appellant has not met his threshold burden of demonstrating that appellate inquiry is warranted. During his providence inquiry, the appellant provided a detailed explanation describing how he found and wrongfully appropriated the debit card and used it to commit numerous larcenies over a five-month period of time. At no time did he inform the military judge that anyone else was involved in any of his offenses. However, in both his clemency request and on appeal, he asserts that PFC White and LCpl Holley were coactors, whose cases are closely related to the appellant's, because he allowed them to use the debit card to commit separate larcenies.

We are not required 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)). Closely related cases are those in which "coactors [are] involved in a common crime, servicemembers [are] involved in a common or parallel scheme, or [there is] some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.* To be closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994).

Since the appellant acted alone in committing his offenses, we do not find that his separate act of providing the stolen debit card to PFC White and LCpl Holley so that they could commit separate acts of larceny established a common crime, common or parallel scheme, or a direct nexus between their criminal offenses and the appellant's. Accordingly, the appellant has not established that his case is closely related to the other two cases, has not established that the summary courts-martial documentation is relevant to his sentence disparity claim and, finally, has not established that there is a reasonable probability that this court would have granted sentencing relief if it reviewed the summary court-martial documentation.

However, assuming, *arguendo*, that the appellant met his threshold burden and further inquiry is warranted, then we are required to "determine what method of review should be used." *Campbell*, 57 M.J. at 138. In our opinion, the information already contained in the record of trial was sufficient to conduct a sentence disparity review. We further note that the information contained in the summary courts-martial records of trial of PFC White and LCpl Holley would not have provided any

additional evidentiary information. Therefore, there is no need to procure any additional information.

Prosecution Exhibits 1 and 2 contain the appellant's admissions to law enforcement authorities concerning his wrongful appropriation and larceny offenses. In those statements, the appellant explained that he provided the stolen card to PFC White and LCpl Holley and provided information concerning the dates and types of merchandise they unlawfully obtained by using the card. See PE 1 at 2; PE 2 at 1. Additionally, the appellant's trial defense counsel's clemency letter to the convening authority summarized the summary courts-martial convictions, including the charges, guilty pleas and sentence, of both PFC White and LCpl Holley. See Major E. J. Peterson, USMC, letter 5800 DEF/EJP of 14 Nov 2005.

The record of trial of a summary court-martial is prepared in accordance with RULE FOR COURTS-MARTIAL 1305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) and Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D ¶ 0150(d) (15 Mar 2004). Specifically, summary courts-martial proceedings are recorded on Department of Defense Form 2329, entitled Record of Trial by Summary Court-Martial, and a JAGMAN-generated form entitled Report of Summary Court-Martial, which do not require a verbatim transcript of the proceedings. See R.C.M. 1305(a), Discussion; JAGMAN ¶ A-1-p(1)-(2). These two documents require jurisdictional information, confirmation that an accused was appraised of his summary courts-martial procedural rights, a list of the charges, pleas, findings, and sentence, and, in a not guilty plea, a synopsis of any evidence. As we noted above, the appellant's trial defense counsel's clemency letter indicates that both PFC White and LCpl Holley pled guilty at their respective summary courts-martial. Therefore, the summary courts-martial reports would not contain a synopsis of the evidence.

Accordingly, we find that this Court did not err in denying the appellant's motion to compel since he did not meet his threshold burden of demonstrating that an appellate inquiry into the summary courts-martial convictions of PFC White and LCpl Holley was warranted. Furthermore, even if the appellant met his threshold burden, the information contained in Prosecution Exhibits 1 and 2 and the trial defense counsel's clemency letter was sufficient to conduct a sentence disparity review.

Sentence Disparity

As we previously indicated, we do not find that the appellant's case is closely related to the summary courts-martial cases of PFC White and LCpl Holley. However, even if we determined that the cases are closely related, the appellant has not met his burden of demonstrating that the cases are highly disparate. *Lacy*, 50 M.J. at 288. The appellant was convicted of

wrongfully appropriating a debit card and using it to commit numerous larcenies for five months. Separate and apart from his offenses, the appellant provided the debit card to PVT White and LCpl Holley and they used it to commit separate larcenies. The fact that the appellant faced more serious charges was an appropriate basis for a determination that his charges should be referred to a special courts-martial, while the lesser charges against PVT White and LCpl Holley were referred to summary courts-martial. See *United States v. Noble*, 50 M.J. 293, 295 (C.A.A.F. 1999). Accordingly, we find that the respective forums are relatively uniform considering the respective offenses.

Finally, even if the appellant had satisfied his burden of establishing that these cases are highly disparate, we believe that the Government has demonstrated a rational basis for the disparity. *Lacy*, 50 M.J. at 288. First, we again note that the appellant was convicted of wrongfully appropriating the debit card and using it to commit numerous larcenies over a five month time period, while PVT White and LCpl Holley were convicted of larceny. Second, the appellant's decision to steal the debit card and permit unauthorized individuals to commit further larcenies with the card heightens the magnitude of the appellant's offenses. Therefore, the appellant's first assignment of error is without merit.

Sentence Appropriateness

The appellant wrongfully appropriated a debit card and proceeded to unlawfully make two cash withdrawals and three purchases of merchandise over the course of five months. After reviewing the entire record, we conclude that the sentence is appropriate for the offenses and the offender. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). Therefore, the appellant's third assignment of error is without merit.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court