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

BEFORE

D.A. WAGNER **R.E. VINCENT** **D.O. VOLLENWEIDER**

UNITED STATES

v.

Marvin C. FUNIESTAS
Staff Sergeant (E-6), U. S. Marine Corps

NMCCA 200600235 Decided 30 November 2006

Sentence adjudged 31 March 2004. Military Judge: P.J. Ware. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by San Diego, Marine Corps Recruit Depot/Western Recruiting Region, Marine Corps Recruit Depot, San Diego, CA.

LCDR LUIS LEME, JAGC, USNR, Appellate Defense Counsel
LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to commit larceny and sell military property, unlawfully selling military property, and larceny, in violation of Articles 81, 108, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 908, and 921. The appellant was sentenced to confinement for ten years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, except he approved confinement for 96 months.[1] Additionally, he suspended all confinement in excess of 66 months for a period of two years from the date of his action.

The appellant alleges two assignments of error. First, he alleges excessive post-trial delay. Second, he contends that his

[1] Pursuant to a pretrial agreement, the convening authority was only required to suspend confinement in excess of 96 months.

sentence is highly disparate as compared to the sentence received by his co-conspirator.

We have examined the record of trial, the appellant's two assignments of error, and the Government's response. We conclude that the findings 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.

Post-Trial Delay

Regarding the appellant's first assignment of error, our superior court has adopted a framework for analyzing post-trial delay, utilizing the four factor analysis of pretrial delay established by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of delay; (2) reasons for delay; (3) the appellant's demand for speedy review; and (4) prejudice. *United States v. Moreno,* 63 M.J. 129, 135 (C.A.A.F. 2006); *see United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004). These four factors are balanced, "with no single factor being required to find that post-trial delay constitutes a due process violation." *United States v. Toohey (Toohey II*), 63 M.J. 353, 359 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 136). The absence of any one factor does not bar finding a due process violation. *Moreno*, 63 M.J. at 136.

Turning to the facts of this case, we find that the delay of 733 days to docket this 178-page guilty plea record of trial with this court following trial is, on its face, unreasonable, triggering a balancing of the four Barker factors to determine if a due process violation has occurred. *Toohey I*, 60 M.J. at 103.

Regarding the first *Barker* factor, we are concerned that the Government needed 203 days to authenticate the record of trial and 425 days to complete the staff judge advocate's recommendation (SJAR) after trial. Additionally, after completion of the SJAR, the Government took another 227 days to complete the convening authority's action. This factor weighs heavily in favor of the appellant. In addressing the second factor, we note, with considerable dismay, that the Government advances no reason for any of the 733-day delay. This factor also weighs heavily in favor of the appellant.

Considering the third factor, we note that the appellant did not state his desire for speedy review until he filed his appellate brief on 31 May 2006, over two years from the date of his sentencing. Under the guidance of our superior court, we conclude that this factor weighs against the appellant, but under the circumstances of this case, not heavily. *United States v. Harvey*, 64 M.J. 13, 36 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 138.

The appellant addresses the fourth *Barker* factor in his brief by claiming prejudice solely due to the fact that he has

remained incarcerated. However, there is no evidence that he was prejudiced by suffering oppressive incarceration pending appeal. *Moreno,* 63 M.J. at 139. Neither does the appellant demonstrate that he has experienced "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision" such that he has suffered prejudice in the form of "constitutionally cognizable anxiety." *Id.* at 140. Finally, the appellant has asserted no error requiring a rehearing, nor does he establish how he would be prejudiced by the delay in the event of a rehearing. *Id*. The appellant has, therefore, presented no factual claim of prejudice suffered as a result of the delay.

Balancing all four factors, we conclude that the circumstances of the delay in this case do not rise to the level of a due process violation and decline to grant relief. Although the first and second *Barker* factors weigh in favor of the appellant, the delay is not "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey II,* 63 M.J. at 362.

We are also aware of our authority to grant relief under Article 66, UCMJ. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown,* 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). At the outset of our analysis, we noted that the convening authority, in an exercise of clemency, reduced the appellant's period of confinement to 96 months and then suspended an additional 30 months. Having considered the factors we articulated in *Brown*, and the clemency relief provided by the convening authority, we decline to provide any additional discretionary relief.

Sentence Disparity

In his second assignment of error, the appellant contends that the approved sentence in his case is highly disparate in comparison with the approved sentence of his co-conspirator, Sergeant (Sgt) Apalacio. In support of his contention, the appellant notes that a general court-martial consisting of officer and enlisted members convicted Sgt Apalacio, contrary to his pleas, of two specifications of making a false official statement in violation of Article 107, UCMJ, as well as the same offenses that the appellant pled guilty to at his general court-martial. The appellant contends that his sentence was highly disparate because Sgt Apalacio was only sentenced to a bad-conduct discharge, confinement for three years, and reduction to pay grade E-1. This issue is without merit.

The appellant and Sgt Apalacio conspired to steal and sell military flak jackets and Modular Lightweight Load-carrying Equipment (MOLLE) gear from the Marine Corps School of Infantry (SOI), Camp Pendleton, California. Sgt Apalacio, who was stationed at the SOI supply warehouse, falsified official

documentation and provided the stolen military property to the appellant. The appellant then sold the military property on eBay, an internet-based sales company, to domestic and international purchasers.[2]

This case requires us to exercise our unique, highly discretionary authority under Article 66, UCMJ, to determine sentence appropriateness. This analysis "includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001)(citing *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)). 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.'" *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)). When we compare sentences of co-conspirators, we initially determine if the cases are closely related, and if so, we then determine if the sentences are highly disparate. The appellant bears the burden of demonstrating that the cases are closely related and highly disparate. *Lacy*, 50 M.J. at 288. If the appellant meets this burden, the burden then shifts to the government to show a rational basis for the differences. *Sothen*, 54 M.J. at 296; *Lacy*, 50 M.J. at 288.

The appellant has met the first burden that the two cases are closely related, since he and Sgt Apalacio were co-conspirators involved in a common crime. We next consider whether the appellant has met his burden of demonstrating that the sentences are highly disparate.

Initially, we note that while both the appellant and Sgt Apalacio were convicted of conspiracy to commit larceny and sell military property, unlawfully selling military property, and larceny of military property, the appellant was convicted of selling and possessing almost twice as much military property. Pursuant to his pleas, the appellant was convicted of conspiracy to steal and stealing approximately $88,000 worth of military property and selling approximately $78,000 worth of military property. During his providence inquiry, the appellant informed the military judge that he made 80 to 90 illegal sales of MOLLE gear and military flak jackets to "customers" on eBay. Record at 45-46. On the other hand, although Sgt Apalacio was convicted of conspiracy with the appellant, he was only convicted of stealing and selling 50 flak jackets and five MOLLE riflemen sets. *See* Appendix A of Appellant's Motion to Attach of 31 May 2006.

In our opinion, the appellant has failed to meet his second burden of demonstrating that his sentence and Sgt Apalacio's

[2] The appellant admitted he sold flak jackets and MOLLE gear to individuals located in China, Japan, Korea, and Puerto Rico. Record at 67.

sentence are "highly disparate". Considering the vast differences between the amount of military property that the appellant and Sgt Apalacio were convicted of stealing and unlawfully selling, their respective sentences fall within an acceptable range "of what one would expect different general courts-martial, in carrying out their obligation to determine an appropriate sentence **based on an evaluation of the offense(s) and the offender,"** to reach. *United States v. Fee*, No. 97 00382, unpublished op., 1997 CCA LEXIS 656 at 2 (N.M.Ct.Crim.App. 8 Dec 1997), *aff'd*, 50 M.J. 290 (C.A.A.F. 1999)(emphasis added). Accordingly, we find that the respective sentences are relatively uniform considering the respective offenses.

Additionally, the test for determining whether sentences are highly disparate "is 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." *Lacy*, 50 M.J. at 289. In the instant case, the appellant was facing a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, 30 years confinement, and reduction to pay grade E-1. Since he did not receive any forfeiture of pay and allowances and was sentenced to a confinement period one-third of the maximum allowable, we conclude that there is a much greater disparity between the appellant's sentence and the potential maximum punishment as compared to the disparity between his sentence and Sgt Apalacio's sentence. *Id*.

However, even if the appellant had satisfied his burden of demonstrating that the two offenses are highly disparate, we believe that the Government has demonstrated a rational basis for the disparity. *Id*. at 288. First, we again note that the appellant was convicted of stealing and selling almost twice as much military property. Second, although Sgt Apalacio initiated the conspiracy, the appellant was the more senior Marine. Third, the appellant was the actual seller of all of the stolen property. *See* Record at 46. During the sentencing portion of the appellant's court-martial, the Government presented extensive evidence indicating that the appellant's actions may have adversely affected national security, foreign policy and economic interests of the United States. Specifically, since the appellant sold some of the military flak jackets and MOLLE gear to individuals located in China, Japan, and Korea, he has potentially provided foreign governments an opportunity to possess sensitive technology. Additionally, the loss of use of the military property adversely affected the School of Infantry's ability to adequately train Marine Corps personnel to use this protective gear prior to deployment in a hostile environment. This evidence significantly heightens the magnitude of the appellant's offenses.

We also note that the different sentences imposed on the appellant and Sgt Apalacio could also be attributed to the fact

that Sgt Apalacio received a relatively lenient sentence from the members before whom he was tried and convicted. *See United States v. Durant*, 55 M.J. 258, 264 (C.A.A.F. 2001)(Effron, J., dissenting).

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).

Conclusion

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

Senior Judge WAGNER and Senior Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court