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

BEFORE

W.L. RITTER **K.K. THOMPSON** **J.F. FELTHAM**

UNITED STATES

v.

Kevin J. LAMBERT, Jr.
Corporal (E-4), U. S. Marine Corps

NMCCA 200401410 Decided 27 November 2006

Sentence adjudged 29 April 2004. Military Judge: J.P. Colwell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

LT J.M. LOKEY, JAGC, USNR, Appellate Defense Counsel
Maj J.ED. CHRISTIANSEN, USMC, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

THOMPSON, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of attempting to sell military property, conspiracy to steal and wrongfully dispose of military property, two specifications of selling military property, larceny of military property, and two specifications of wrongfully receiving military property, in violation of Articles 80, 81, 108, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 908, 921, and 934. The military judge sentenced the appellant to confinement for 10 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence, but suspended confinement in excess of 72 months in accordance with a pretrial agreement.

We have considered the record of trial, the appellant's assignment of error that the sentence was inappropriately severe and highly disparate from the sentence of his co-actor, Sergeant

(Sgt) Joshua J. Giddings, and, absent objection by either party, pertinent portions of the record of trial in the case of *United States v. Giddings*, No. 200401728. Based partially on the disparity with his co-conspirator's sentence, we hold that the sentence was inappropriately severe. As modified, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Closely-Related Cases

The appellant's co-conspirator, Sgt Giddings, was convicted by a general court-martial of similar offenses stemming from a common scheme. He was sentenced to confinement for five years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. Pursuant to his pretrial agreement, the convening authority approved the sentence as adjudged, but suspended confinement in excess of 60 months. The same convening authority acted in both cases. The appellant was sentenced on 29 April 2004. Sgt Giddings was sentenced on 15 June 2004.

The appellant argues that his sentence to 10 years of confinement and a dishonorable discharge is inappropriately severe. Although the appellant notes four related cases of co-actors involved in this common scheme in his brief,[1] he asserts that only the case involving Sgt Giddings was closely related to this case, and claims that there are no good or cogent reasons for the disparity in his sentence when compared to that of Sgt Giddings.

In response, the Government argues that the appellant's sentence is appropriate, and that the case of Sgt Giddings is not closely related. The Government clearly takes issue with the appellant's suggestion that his sentence is inappropriately severe. Further, the Government suggests several reasons for the alleged disparity in sentences, citing the following factors: (1) the appellant was the catalyst and constant presence in all of the cases; (2) Sgt Giddings only approached the appellant to sell stolen military property because the appellant was known to be someone who could "get stuff;" (3) Sgt Giddings was only involved in a single conspiracy, while the appellant conspired separately with four others; (4) the appellant initiated all of the criminal acts and masterminded the conspiracies and transactions; (5) the appellant was convicted of more crimes on

[1] The related cases referred to by the appellant involve Corporal (Cpl) Garcia, Lance Corporal (LCpl) Peters, and LCpl Clark.

more occasions than Sgt Giddings; and (6) the appellant faced a far greater maximum punishment than Sgt Giddings. Government Brief of 27 Dec 2005 at 4-6. After a review of both records of trial for the appellant's case and that of Sgt Giddings, we determine that the records do not support the assertions of the Government.

Background

Both the appellant and Sgt Giddings were stationed at Camp Lejeune, North Carolina. Sgt Giddings worked at the Second Combat Engineer Battalion supply warehouse on the base where he was the senior noncommissioned officer (NCO). He was senior in rank by one pay grade to the appellant. Prior to commission of the charged offenses, the appellant was approached by a former Marine acquaintance, Billie Belcher, who was interested in buying military property. Previously, while stationed in Kuwait, the appellant became known as someone who could obtain hard to find health and comfort items. Unbeknownst to the appellant, Belcher was acting on behalf of the Naval Criminal Investigative Service (NCIS). The appellant declined Belcher's offer at that time, but they kept in contact.

Sgt Giddings had possession of six MK 152 Remote Control Detonation Devices (hereinafter referred to as MK 152 kits) in the warehouse where he worked at least two months prior to any contact with the appellant concerning their disposition. Each MK 152 kit was worth approximately $20,000. Although it was required that these kits be kept in the armory, Sgt Giddings admitted to maintaining them in the warehouse under his control without authority.

In approximately September 2004, Sgt Giddings approached the appellant and asked him if he knew anyone who would be interested in buying an MK 152 kit. The appellant replied that he might know someone and contacted Belcher, arranging a meeting with him at the barracks later that day. Sgt Giddings directed the appellant to accept no less than $1000.00 for the MK 152 kit. Sgt Giddings then removed the kit from the warehouse and placed it in his personal vehicle, from which the appellant later retrieved it.

At the meeting in the barracks, the appellant tried to sell the MK 152 kit for the price set by Sgt Giddings. However, the undercover NCIS agent offered only $800. The appellant left the room and consulted with Sgt Giddings about accepting a lower price. Sgt Giddings agreed to the lower price and the sale was

completed for $800. Sgt Giddings received $700 of the proceeds from this sale and the appellant received $100. At a later time, the appellant also received from Sgt Giddings a half pound of C-4 explosive and approximately 50 inches of detonation cord. He sold the C-4 and detonation cord to an undercover NCIS agent, and gave the proceeds to Sgt Giddings.

The appellant also initiated contact with and received two MK 152 kits and blasting caps from two Marines, Lance Corporal (LCpl) Garcia and LCpl Peters. When the appellant attempted to sell these items to an undercover NCIS agent, he was taken into custody. From this point forward, the appellant cooperated fully with law enforcement authorities. In his pretrial agreement, the appellant agreed to plead guilty to the charged offenses and to testify against other co-actors, including Sgt Giddings. The military judge who presided over the appellant's trial did not preside over Sgt Giddings' trial. The same trial counsel prosecuted both cases.

The Appellant's Offenses

Of the seven specifications of wrongdoing to which the appellant pled guilty, three specifications, the conspiracy to sell, the larceny of, and sale of one MK 152 kit (provided by SGT Giddings), were also charged against Sgt Giddings. The appellant was convicted of two specifications involving receiving and selling the C-4 explosive and detonation cord, which he had also obtained from Sgt Giddings. In spite of Sgt Giddings' involvement in providing the C-4 explosive and detonation cord to the appellant, he was not charged with any offense concerning these items.

The final two specifications charged against the appellant involved receiving and attempting to sell two MK 152 kits which he received from two other Marines, LCpl Garcia and LCpl Peters. The appellant had also received 12 blasting caps from them, and was charged with receiving these items in the same specification listing the C-4 explosive and detonation cord.

During the sentencing portion of the appellant's trial, the prosecutor introduced testimony from the undercover NCIS agent involved in the sting operation and arrest of the appellant, as well as testimony from Master Sergeant (MSgt) Thompson, a witness with extensive experience in explosive techniques, who testified concerning the potential harm of the appellant's actions. MSgt Thompson explained the various uses of the half-pound of C-4 explosive, the approximately 50 inches of

detonation cord, the non-electric blasting caps, and the MK 152 kits. In response to questions from the military judge, MSgt Thompson testified concerning the destructive power of these items.

In mitigation, a fellow Marine and the appellant's parents testified on his behalf. Evidence concerning the appellant's good record of service was introduced. Several letters from friends and family were introduced. The appellant had served in Operation Iraqi Freedom in Kuwait. During training exercises there, he suffered an injury to his back which prevented his going into Iraq with his unit. He also suffered from Attention Deficit Disorder (ADD) as a child. He faced a maximum confinement of 53 years and 6 months.

Sgt Giddings' Offenses

Sgt Giddings was also charged with and pled guilty to seven specifications of wrongdoing. As previously mentioned, three of those offenses were also charged against the appellant. It should be noted that, although Sgt Giddings was charged with only one specification of conspiracy, the charged conduct encompassed two separate conspiracies. The first conspiracy was in concert with the appellant concerning the first MK 152 kit. The second conspiracy involved Sgt Giddings' agreement with LCpl Clark to dispose of the remaining five MK 152 kits and binoculars in Sgt Giddings' possession in order to impede a criminal investigation. The second conspiracy did not involve the appellant. Because Sgt Giddings was charged with only one specification of conspiracy, the military judge agreed to treat it as one offense when determining Sgt Giddings' sentence.

Additionally, Sgt Giddings pled guilty to three specifications involving larceny of the five MK 152 kits of a value of $120,000 which he had kept in the warehouse, wrongful appropriation of a claymore kit, and wrongful appropriation of a trigger assembly, of a value of less than $500.

Finally, Sgt Giddings was convicted of one specification of impeding a criminal investigation by involving the assistance of other junior Marines to bury military property, and hide evidence of its transportation and disposal. Sgt Giddings did not cooperate with law enforcement authorities. He was represented by a civilian counsel and obtained a pretrial agreement which contained no agreement to testify against other co-actors.

Sgt Giddings was not charged with any offense concerning the C-4 explosive or detonation cord which he had provided to the appellant. Because he was only charged with one specification of conspiracy, although his conduct encompassed two separate conspiracies, Sgt Giddings faced limited maximum punishment exposure. The prosecutor, although aware of Sgt Giddings' involvement in the sale of the MK 152 kits and C-4 explosive and detonation cord, chose not to present any evidence in aggravation against Sgt Giddings.

Matters in mitigation similar to those presented at the appellant's trial were introduced at Sgt Giddings' trial. Sgt Giddings' sister and mother testified, and several certificates and letters of support were introduced. Favorable evidence concerning Sgt Giddings service record was introduced. Sgt Giddings served in combat in Iraq and evidence was introduced indicating that he too suffered from ADD as a child and was possibly suffering from post-traumatic stress disorder. Sgt Giddings faced a maximum confinement of 45 years and nine months.

Discussion

As a general rule, sentence comparison is appropriate only in those instances of highly disparate sentences in closely related cases. *United States v. Olinger,* 12 M.J. 458, 460 (C.M.A. 1982). To be closely related, the cases must involve charges that are similar in nature and seriousness or that arise from a common scheme or design. *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). If the cases are closely related and the sentences are highly disparate, the disparity must be supported by a rational basis. *United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999). When a wide disparity exists for reasons without a rational basis, we have the discretion to remedy the problem. *Kelly,* 40 M.J. at 570. The appellant bears the burden of demonstrating that any cases are closely related and that the sentences are highly disparate. *Lacy,* 50 M.J. at 288. The purpose of sentence comparison in closely related cases is to achieve "relative uniformity." *Olinger,* 12 M.J. at 461. Relative uniformity, however, does not mean mathematical equivalency. *Id*.

Olinger and its progeny establish that if two cases are closely related and yet result in widely disparate dispositions or sentences that are unsupported by good and cogent reasons, a Court of Military Review has the discretion to exercise its Article 66, UCMJ, authority to reduce the disparity upon review to erase any unfairness or injustice in the proceedings. *Id.*

This authority is necessary to ensure both fairness and integrity in fact, as well as the appearance of fairness and integrity, without which the public, members of Congress, and service personnel will lose confidence in the military justice system. *Kelly,* 40 M.J. at 570.

In raising the issue of sentence disparity, the appellant has the burden of "demonstrating that any cited cases are 'closely related' to his . . . case and that the sentences are 'highly disparate.'" *Lacy,* 50 M.J. at 288. Applying the criteria set forth in *Kelly*, we find that the appellant has met his burden of demonstrating that his case is closely related to that of Sgt Giddings.

We next consider whether the appellant has met his burden of demonstrating that the sentences are highly disparate. We find that the appellant has met his burden in this regard. Although the appellant faced a maximum punishment which included seven years and nine months more confinement than that faced by Sgt Giddings, the appellant received twice the confinement and a more serious discharge than did Sgt Giddings. The Government urges that good and cogent reasons exist for the difference in the two sentences and asserts that the appellant's punishment is appropriate. We agree that the appellant's sentence, in light of his offenses, is entirely appropriate, however, we disagree with the Government's contention that there is a rational basis for the difference between it and the sentence imposed upon Sgt Giddings.

This court must decide the central issue of whether this disparity in sentence is for good and cogent reasons. *Kelly,* 40 M.J. at 571. In doing so, we must determine whether the unreasonable disparity between these cases is a result of a benign factor or from an impermissible factor. *Id.* at 572.

Several factors warrant consideration. A comparison of both records reveals no significant difference in matters introduced in extenuation and mitigation on behalf of the appellant and Sgt Giddings. We also consider the fact that the appellant initially refused to get involved in disposing of military property when approached by Belcher, only contacting him after Sgt Giddings approached the appellant with a criminal enterprise. Furthermore, after the appellant was arrested while trying to sell other stolen property to the same undercover agent, he cooperated fully with law enforcement authorities.

In comparison, we consider the fact that, as the senior NCO, Sgt Giddings was invested with greater responsibility and authority than the appellant. Sgt Giddings solicited junior Marines to engage in misconduct. Sgt Giddings outranked the appellant and was the warehouse NCO where he kept the MK 152 kits. Sgt Giddings engaged in criminal conduct prior to any contact with the appellant, by illegally possessing six MK 152 kits. Sgt Giddings set the price for the sale of the kit and, when the undercover agent posing as the buyer balked at paying the full $1000 asking price, gave permission to the appellant to accept the lower price. Sgt Giddings received the lion's share of the proceeds from that sale and the later sale of the C-4 explosive and detonation cord. After learning of the appellant's arrest, Sgt Giddings, in an effort to avoid detection of his crimes, promptly involved a second junior Marine (LCpl Clark) in a scheme to dispose of the remaining five MK 152 kits and binoculars by loading the property into a military vehicle. Sgt Giddings had LCpl Clark drive to a remote part of the base and bury the property, which was worth approximately $100,000. In doing this, LCpl Clark involved yet a third Marine (LCpl Chan) to assist him in the disposal of this property. Evidence of the use of the military vehicle was destroyed as part of the plan to obstruct any criminal investigation into their activities. In light of the foregoing, we view Sgt Giddings as more culpable than the appellant.

The decision whether to remedy a disparity turns on the reasons for it. Our discretion clearly should be exercised in cases in which the disparity in disposition or sentence results from a factor that seriously detracts from the appearance of fairness and integrity in military justice proceedings. *Kelly,* 40 M.J. at 570. We conclude that the disparity between these cases results largely, although not entirely, from Sgt Giddings' relatively light sentence. *See United States v. Durant,* 55 M.J. 258, 264 (C.A.A.F. 2001)(Effron, J., dissenting). Furthermore, from the evidence summarized above, we find that this leniency is due, in large part, to the fact that the Government did not fully charge Sgt Giddings for his involvement in this overall scheme, which resulted in his facing a lower possible maximum punishment. Additionally, the prosecutor, being fully aware of each co-actor's level of participation and culpability, selectively chose not to present any evidence in aggravation in Sgt Giddings' court-martial, after having presented such evidence at the appellant's court-martial six weeks earlier. We are perplexed by the Government's actions in this regard as no benefit was to be gained as a result. Whereas the appellant had cooperated fully with authorities and agreed to testify later on

behalf of the Government against the other co-actors, Sgt Giddings did not.

In light of the records before us, the reasons set forth by the Government are unconvincing. We find that the only rational explanation for the disparity in the sentences awarded in these cases stems from the Government's actions. Not only do we conclude that the disparity is not supported by good and cogent reasons, we also find that it occurred as the result of an impermissible factor and that relief is warranted.

We have no authority under the UCMJ to take any action concerning Sgt Giddings, however, we can "balance the scales" by reducing the appellant's otherwise appropriate sentence to ensure the fairness and integrity of the military justice system. *Kelly,* 40 M.J. at 574-75. As a result of our decision, we reassess the sentence in accordance with the principles of *United States v. Cook,* 48 M.J. 434 (C.A.A.F. 1998); *United States v. Peoples,* 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986).

Conclusion

Accordingly, the findings are affirmed. However, only so much of the approved sentence extending to confinement for five years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge is affirmed. As reassessed, we conclude that the sentence is appropriate for this offender and his offenses.

Judge FELTHAM concurs.

RITTER, Senior Judge (concurring in part/dissenting in part):

I concur with the majority opinion as to findings, but must respectfully dissent as to sentence. I am not persuaded that the sentence is either inappropriately severe or highly disparate with the sentence in a closely related case. I would therefore vote to affirm the sentence as adjudged.

The majority finds that the appellant's case is closely related to that of Sergeant (Sgt) Giddings, and that the appellant's adjudged sentence, including a dishonorable discharge and 10 years of confinement, is highly disparate in comparison to the bad-conduct discharge and 5 years in Sgt Giddings' adjudged sentence. I question whether, under our

superior Court's reasoning in *United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001), the appellant's additional serious offenses not involving Sgt Giddings undercut the "closely related" designation for purposes of sentence comparison. Further, even if the two cases are deemed to be closely related, I find a legally sufficient justification for the disparity between the two sentences.

The appellant conspired with Sgt Giddings to steal and wrongfully dispose of one MK 152 remote control detonation device, worth $20,000.[1] He then aided Sgt Giddings in stealing the MK 152 device and selling it to undercover agents of the Naval Criminal Investigative Service (NCIS). He also wrongfully received from Sgt Giddings about 1/2 pound of Combination 4 (C4) plastic explosive and 50 inches of detonation cord, which he later sold to NCIS undercover agents.

But this was not the full extent of the appellant's misconduct. He also approached three other Marines, and wrongfully received from them and attempted to sell a total of two other stolen MK 152 devices and 12 non-electric blasting caps. Sgt Giddings was not implicated in these offenses.

Our superior Court requires a Court of Criminal Appeals to engage in sentence comparison with specific cases only where the cases are "closely related." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). "Closely related" refers to cases in which co-actors are involved in a common crime, or in a common or parallel scheme, or where there is some other direct nexus between the servicemembers whose cases are being compared. *Lacy* 50 M.J. at 288. But cases are not closely related where only a fraction of an appellant's offenses relate to the case sought to be compared. *See Wacha*, 55 M.J. at 268 (cases not closely related where only 4 of appellant's 16 offenses involved co-actor).

The case law does not clearly set out a standard for determining when co-actors' cases are not deemed "closely related" because of additional misconduct not involving each other. Here, the offenses of which the appellant was convicted

[1] Although the conspiracy was originally charged as having involved a larger number of Marines and MK 152 devices, the appellant pled guilty by exceptions and substitutions. The military judge entered a "straight guilty plea" and convicted the appellant without exceptions and substitutions because he viewed the excepted language as no longer being before the court. Record at 103-05.

that did not involve Sgt Giddings were at least as serious as the offenses in which they worked together. By the logic of our superior Court in *Wacha*, it is arguable that the two cases are **not** closely related because of the appellant's serious offenses not involving Sgt Giddings.

But even if the *Lacy* court's anecdotal description of "closely related" cases includes this case, I view the disparity between the two cases as legally justified.

As the majority points out, Sgt Giddings was charged with one conspiracy, although the charged conduct encompassed two separate conspiracies. The appellant also was charged with only one conspiracy, but he admitted in the providence inquiry to initiating two more deals similar to the one with Sgt Giddings. These two deals involved a total of three Marines, explosives as well as detonating devices, and military property of a far higher value.[2] Thus, had the appellant been charged with these additional conspiracies, the disparity between his and Sgt Giddings' maximum punishment would have been even greater.

There are other rational reasons for the disparity in the two sentences. The appellant stated during the providence inquiry that Sgt Giddings initially approached him with the scheme because of the appellant's reputation for "getting things" for service members while stationed in Kuwait. The agreement between the appellant and Sgt Giddings was that the appellant would sell the stolen material *if and when he was approached by potential buyers*. Record at 45, 47-48. This clearly shows that the appellant was already known for the kind of behavior that led to these charges before Sgt Giddings ever approached him, and corroborates the appellant's admission that the one pay grade difference between him and Sgt Giddings did not make him feel coerced to join into the latter's proposed conspiracy. Record at 50-51. Finally, as the majority notes, Sgt Giddings presented evidence during the presentencing hearing of his honorable service in Iraq. I consider this a "significant difference" between the two cases, despite the majority's contention otherwise.

Finding significant differences between the offenses in the appellant's and Sgt Giddings' cases, I am not convinced the two cases are "closely related" for sentencing purposes. Assuming *arguendo* they are closely related, I agree that the sentences

[2] While Sgt Giddings' second conspiracy and unrelated charges involved more MK 152 devices, these devices were not involved in any sale transaction, but were hidden to avoid prosecution for theft.

are highly disparate, but would find the above reasons constitute a rational basis for the differences in the sentences. Finally, considering the seriousness of the appellant's offenses and the sentencing case he presented, I view the adjudged sentence to be fully appropriate for this offender and his offenses. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

For the Court

R.H. TROIDL
Clerk of Court