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

BEFORE

D.O. VOLLENWEIDER **V.S. COUCH** **A. DIAZ**

UNITED STATES

v.

Carl V. WEDEMEIER
Cryptologic Technician Maintenance Third Class (E-4), U. S. Navy

NMCCA 200600191 Decided 6 November 2006

Sentence adjudged 23 August 2005. Military Judge: R.C. Klant. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LT A.M. SOUDERS, JAGC, USNR, Appellate Defense Counsel
CDR MICHAEL J. WENTWORTH, JAGC, USNR, Appellate Defense Counsel
LT JESSICA M. HUDSON, JAGC, USNR, Appellate Government Counsel
LCDR MONTE G. MILLER, JAGC, USNR, Appellate Government Counsel

DIAZ, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of sodomy with a child, indecent acts with a child, taking indecent liberties with two children,[1] and three specifications of wrongfully furnishing alcohol to minors, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The military judge sentenced the appellant to confinement for 14 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence.

We have considered the record of trial, the appellant's sole assignment of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact

[1] The appellant pled guilty to two specifications of taking indecent liberties under Charge II, but the military judge merged the offenses.

and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Disparate Sentence

The appellant contends that his sentence to an unsuspended bad-conduct discharge is inappropriately severe and disparate when compared to the sentences in three closely related companion cases. We disagree.

While the power to award clemency is reserved for the convening authority, we are charged to affirm only those sentences that we deem fair and just. *United States v. Cavallaro,* 14 C.M.R. 71, 74 (C.M.A. 1954). In the normal course of events, we determine sentence appropriateness without regard to sentences in other cases. *United States v. Olinger,* 12 M.J. 458, 460 (C.M.A. 1982). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In closely related cases, however, we may afford relief where the sentences are "highly disparate." *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). The appellant bears the burden of demonstrating that any cited cases are "closely related" to his case and that the sentences are "highly disparate." *United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999). If the appellant meets that burden, then the Government must show that there is a rational basis for the disparity. *Id.*

In this case, the appellant points to the cases of three other Sailors who were also convicted of various sex crimes involving the same minor victims. Appellant's Brief of 5 Jul 2006 at 2-4. We find that these cases are closely related. Nevertheless, the issue turns on whether the sentences are, in fact, highly disparate, and, if so, whether there are good and cogent reasons for the disparity. *See Kelly,* 40 M.J. at 570.

Looking first at sentence appropriateness, after reviewing the entire record, and considering the nature and seriousness of the offenses, we do not find the adjudged sentence to be inappropriately severe. During the providence inquiry, the appellant admitted that he invited GK, a 12-year-old runaway, to stay with him in his barracks room, and then (a) allowed GK to sodomize him (the appellant then knowing that she was less than 16 years old); (b) fondled GK's breasts and genitalia repeatedly, and digitally penetrated GK's vagina (these acts occurring on two separate dates over a two-month period); (c) showed sexually explicit videos to GK and another girl under the age of 16; and (d) provided alcohol to GK and two other minor girls. Moreover, the appellant committed indecent acts with GK even after the victim's mother told him that GK was only 12 years old. On these

facts, we have little trouble concluding that the appellant's sentence is appropriate for these offenses and this offender.

Turning next to the issue of sentence disparity, we have compared the appellant's sentence with the resolution of the three related cases. Before turning to that comparison, however, we address the appellant's suggestion that, because the convening authority disapproved the bad-conduct discharge in one of the companion cases so as to "better align[] this sentence" with that of a CTM3 Delreco Harris, who did not receive a punitive discharge at trial, we are bound to take a similar action in the appellant's case. Appellant's Brief at 4. We disagree and emphasize that we must make our own independent determination as to whether the alleged sentence disparity in these cases amounts to an "obvious miscarriage of justice or abuse of discretion." *United States v. Swan,* 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995) (quoting *Olinger,* 12 M.J. at 461).

As to that issue, we note first that the appellant's sentence is relatively light compared to the maximum punishment that he was facing. *See Lacy,* 50 M.J. at 289 (stating that a court of criminal appeals' analysis of sentence disparity "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.").

Second, as the Government points out in its brief, the appellant's adjudged sentence is less severe than those received by two of the three other Sailors charged, and so we fail to see how comparison of these cases advances the appellant's cause. *See United States v. Wacha,* 55 M.J. 266, 267 (C.A.A.F. 2001)(stating that a court of criminal appeals is 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.")(Emphasis added).

Third, even after considering the approved sentences in the companion cases (and specifically considering that the approved sentence in one case included a punitive discharge, while the approved sentences in two others did not), we agree with the Government that the appellant's case is factually distinguishable.

While we do not attach great significance to the claims made by the accused in the companion cases that they did not know that the victims were underage, we do know that the appellant suspected immediately that GK was less than 16 years old, and his suspicions were later confirmed by the victim's mother, who told the appellant that GK was but twelve. Despite this, the appellant again engaged in indecent acts with GK.

Moreover, the appellant's cultivation of this relationship led to his taking indecent liberties with GK and another minor

victim, and to his wrongfully plying three young girls with alcohol, in violation of California state law. The accused in the companion cases, on the other hand, were convicted of offenses occurring on a single day.

In short, the appellant has not met his burden of showing that his sentence is **highly** disparate to the sentences in the closely related cases. In any event, the record provides good and cogent reasons for any disparity that does exist. Accordingly, we decline to grant relief.

Conclusion

We affirm the findings and the sentence, as approved by the convening authority.

Senior Judge VOLLENWEIDER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge DIAZ participated in this case prior to detaching from the court and retiring from the Marine Corps Reserve.