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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **W.F. L. RODGERS**

UNITED STATES

v.

Fabian S. BOODHOO
Seaman Apprentice (E-2), U.S. Navy

NMCCA 200201205 Decided 17 October 2005

Sentence adjudged 8 June 2001. Military Judge: P.J. Straub. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Hospital Corps School, Great Lakes, IL.

Capt RICHARD A. VICZOREK, USMC, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RODGERS, Judge:

Contrary to his pleas, the appellant was convicted by a special court-martial, composed of officer and enlisted members, of conspiracy to commit forgery and larceny and two specifications of larceny, in violation of Articles 81 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 921. The appellant was sentenced to a bad-conduct discharge, confinement for 90 days, forfeiture of $694.00 pay per month for 3 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant presents five assignments of error, arguing that: (1) hearsay testimony was improperly admitted under the statements of a co-conspirator exception; (2) an unsuspended bad-conduct discharge is an inappropriately severe punishment because it is disparate with the sentence awarded to a co-conspirator; (3) the convening authority failed to note in his action any companion case to the appellant's; (4) the legal officer who prepared the post-trial recommendation should have been disqualified because he had preferred charges against the

appellant; and (5) the court-martial promulgating order misstates the findings with respect to two specifications of one charge.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we find no error, in the case of (2) above, and at most harmless error with respect to (1) and (3)-(5), requiring, in the case of (5) only, corrective action in our decretal paragraph. We conclude that with such modification, 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.

Facts

The appellant was charged with conspiring with another Sailor, Seaman Recruit Hodge, U.S. Navy, to commit forgery and larceny, and in order to effect the object of their conspiracy, they planned a theft of clothing from a Burlington Coat Factory Store, and carried out the plan. The appellant was also charged with stealing a checkbook from Seaman Recruit Diggs, and $694.10 worth of clothing from Burlington Coat Factory. Those additional facts necessary to address the assigned errors appear *infra*.

Admissibility of Testimony

In his first assignment of error, the appellant contends that the military judge erred by admitting, over defense objection, the testimony of a civilian police detective wherein that detective relayed certain statements that the appellant's co-conspirator, Seaman Recruit Hodge, had made to him, including relaying of words that the appellant allegedly spoke to Hodge himself. The statements concerned the involvement of the appellant and Hodge in forging and presenting a stolen check to Burlington Coat Factory. Record at 81-83.

After examining not only the content of the detective's testimony, but also the testimony of all witnesses and the other evidence presented at trial, we find it unnecessary to consider whether the testimony at issue[1] was hearsay and, if so, whether it fell under any hearsay exception, including possibly the claimed exception of statements made during or in furtherance of a conspiracy. We so find because all the salient testimony at issue was in effect cumulative or not required. Other testimony properly before the court independently established either the same points or separate facts sufficient to establish the elements of the relevant offenses.

---

[1] It is unclear from the appellant's brief whether he objects to all the testimony the detective presented based on his interview with Seaman Recruit Hodge or merely the alleged remarks of the appellant which Seaman Recruit Hodge quoted to the detective. While both the trial judge and appellate Government counsel focused solely on the two instances where Hodge actually quoted the appellant, it appears much more of the detective's testimony about Hodge's statements is arguably hearsay.

Specifically, the information relayed by the detective based on his interview of Seaman Recruit Hodge was, in relevant part, that: Hodge stated he went to the clothing establishment with the appellant; the appellant had blank checks and in fact said to him "I got checks"; the appellant loaded a cart with merchandise; the appellant "talked" Hodge into writing a check; the appellant then signed the check; Hodge and the appellant returned to their military base with their purchases. *Id.*

Seaman Recruit Hodge himself testified. He independently set forth all the salient points to which the detective testified concerning the actions in the store. Record at 109-118. Luis A. Lopez, the sales clerk who processed the transaction also testified. Record at 143-150. Finally, the check and sales receipt themselves were introduced. Prosecution Exhibits 1 and 2.

Therefore, assuming *arguendo* that the detective's testimony was hearsay, that it fell under no exception permitting admission, and that the military judge consequently erred in admitting it, that error was nonetheless harmless. Even without such evidence the members had other evidence sufficient to find the appellant guilty of conspiracy to steal the checkbook and clothing as well as the actual thefts of the same.

Sentence Inappropriateness due to Disparity

The appellant argues that a sentence including an unsuspended bad-conduct discharge is inappropriately severe, apparently principally if not solely because his sentence was allegedly disparate with that received by his co-conspirator. Appellant's Brief of 27 May 2004 at 6-7. We disagree.

In *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999), the Court of Appeals for the Armed Forces set forth a three prong test for evaluating claims of sentence disparity: first, determine how closely related the cases are; second, evaluate whether the sentences are in fact, highly disparate; and, finally, identify whether any rational basis exists for the disparity.

The military judge in this case put on the record at the outset of trial the fact that he had accepted a guilty plea from Seaman Recruit Hodge, the individual cited in the appellant's charge sheet as his co-conspirator and accomplice. The record further noted the sentence that Hodge received: 35 days' confinement and forfeiture of $435.00 pay per month for three months. Record at 25.

We agree with the appellant that the cases are closely related, and thus the first prong of *Lacy* is met. We are less convinced, but accept, *arguendo,* that the sentences are highly disparate because the appellant received a bad-conduct discharge

and Seaman Recruit Hodge did not. The second *Lacy* prong is satisfied.

We do not accept the appellant's claim, however, that "there is no rational basis" for the disparity of sentences between Seaman Recruit Hodge and himself. Appellant's Brief at 7. The appellant pled not guilty to his crimes, and forced a contested trial with members, while Seaman Recruit Hodge pleaded guilty before a military judge alone. Record at 18, 25, 76, 109. That distinction is a rational basis for the different sentences received. *See United States v. Rodriguez*, 57 M.J. 765, 774 (N.M.Ct.Crim.App. 2002).

Accordingly, we find the appellant's claim that his sentence is inappropriate due to its disparity with the sentence of Seaman Recruit Hodge to be unpersuasive. Based on the entire record, including the case in extenuation and mitigation and the appellant's unsworn statement, we further find that the appellant's sentence is not inappropriately severe for this offender and these offenses. Art. 66(c), UCMJ. Accordingly, we decline to grant relief.

Failure of Convening Authority to Cite Companion Case

The appellant also notes that the convening authority's action fails to note any companion case to the appellant's.

The requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C § 0151a(2)(Ch-3, 27 July 1998). "The requirement, however, is limited to those cases convened by the same convening authority." *United States v. Ortiz,* 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000). "The purpose of this requirement is . . . to ensure that the convening authority makes an informed decision when taking action on an accused's court-martial." *Id.* The burden is upon the appellant, however, to show that the related case was convened by the same convening authority. *Id.; United States v. Watkins,* 35 M.J. 709, 716 (N.M.C.M.R. 1992).

The convening authority did not mention any companion cases in his action. Yet, it is clear from the record of trial that Seaman Recruit Hodge's case was a companion case and that he was also tried by court-martial. Significantly, though, the record does not offer any more evidence of Seaman Recruit Hodge's court-martial than the recollections of the military judge, the trial counsel, and Seaman Recruit Hodge himself. Record at 18, 25, 76, 109. Thus, we do not know if the appellant and Seaman Recruit Hodge were referred to trial by the same convening authority. Clearly, appellant has not met his burden of proof in this regard.

Assuming *arguendo,* however, that Seaman Recruit Hodge was referred to trial by the same convening authority,[2] we find no harm to the appellant in this failure. The appellant asserts that the "convening authority in this case did not make an informed decision" because he was not aware of the different sentences meted out to the appellant and Seaman Recruit Hodge. Appellant's Brief at 8. We, however, as set forth above, do not agree that the sentences are impermissibly disparate. If, then, there was no impermissible sentence disparity, and that is the chief harm that ostensibly arises from the failure to note a companion case, clearly there was no harm to the appellant from the failure to note this companion case. Finally, we note that the convening authority considered the record of trial. Contained within the record is the relevant information concerning Seaman Recruit Hodge's court-martial.

Legal Officer's Recommendation

Ensign Timothy D. Barnes, U.S. Naval Reserve, preferred charges against the appellant on 13 March 2001. Charge Sheet. He also prepared the legal officer's recommendation dated 15 October 2001.

The appellant correctly notes that in *United States v. Zaptin*, 41 M.J. 877, 879 (N.M.Ct.Crim.App. 1995), it was held that a Legal Officer is not automatically precluded from preparing the required recommendation solely because he was the accuser in the case if he is only a "nominal" accuser.

We adhere to our earlier *Zaptin* decision that absent any evidence that a legal officer has acted as anything more than a nominal accuser, such an officer is not precluded from preparing a recommendation.[3] In this case there is also no evidence that Ensign Barnes was anything more than a nominal accuser. Accordingly, we decline to grant relief.

Promulgating Order

The appellant correctly notes (Appellant's Brief, at 10), and the Government implicitly concedes (Government Brief, at 16-17), that the court-martial promulgating order incorrectly reflects that no findings were entered with respect to Specifications 3 and 4 of Charge II, when in fact the military judge *sua sponte* entered findings of not guilty with respect to those specifications and dismissed them. Record, at 211-15. We also note that the "Corrected Special Court-Martial Order" dated 26 October 2001, incorrectly reflects that Charge II was a violation of Article 81, UCMJ. An appellant is entitled to have

[2] Both the appellant and Seaman Recruit Hodge were attached to the same command.

[3] Indeed, while Article 6(c) of the UCMJ and RULE FOR COURTS-MARTIAL 1106(b), UNITED STATES (2000 ed.), prohibit certain individuals from acting as legal officers, accusers are not among those prohibited. *See Zaptin* 41 M.J. at 880.

official records correctly reflect the results of his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will order corrective action in our decretal paragraph.

Conclusion

Accordingly, the findings and the sentence are affirmed. The supplemental court-martial order shall be modified to reflect "not-guilty" findings as to Specifications 3 and 4 of Charge II, and that Charge II alleges violations of Article 121, UCMJ.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court