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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.C. HARRIS**

UNITED STATES

v.

Frank JOHNSON, Jr.
Sergeant (E-5), U.S. Marine Corps

NMCCA 200300716 Decided 18 July 2005

Sentence adjudged 4 December 2002. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island, SC.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CDR BREE ERMENTROUT, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN C.HARRIS, USMC, Appellate Government Counsel

HARRIS, Judge:

The appellant was tried by a general court-martial composed of a military judge, sitting alone. Pursuant to his pleas, the appellant was convicted of four specifications of conspiracy to commit larceny of military property (two specifications asserting theft of 5.56mm rifle ammunition and two specifications asserting theft of 9mm pistol ammunition), four specifications of wrongfully selling military property (two specifications asserting sale of 5.56mm rifle ammunition and two specifications asserting sale of 9mm pistol ammunition), and two specifications of larceny of military property (one specification asserting theft of 12,800 rounds of 5.56mm rifle ammunition of a value of about $4,736.00 and one specification asserting theft of 1,670 rounds of 9mm pistol ammunition of a value of about $267.20). The appellant's crimes violated 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 66 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the adjudged sentence and, except for the dishonorable

discharge, ordered the punishment executed. Pursuant to the terms of a pretrial agreement, the CA suspended confinement in excess of 48 months for the period of confinement actually served plus 12 months.

We have carefully considered the record of trial and the appellant's three assignments of error (AOEs) alleging sentence disparity, unreasonable multiplication of charges (UMC), and an erroneously titled CA's action. We have also considered the Government's response. We conclude that UMC occurred. We find that, based on the specific facts of the appellant's case, Specifications 1-4 of Charge I (Conspiracy to commit larceny of military property) represent UMC. We shall take corrective action in our decretal paragraph. We conclude that the findings, as modified, and the sentence, as reassessed, are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Sentence Disparity

In the appellant's first AOE, he asserts that his sentence is highly disparate from the sentences awarded in the closely related companion cases of Corporal (Cpl) Ronald W. Robinson and Sergeant (Sgt) Jimmy A. Thornton, both U.S. Marine Corps. The appellant avers that this court should not affirm any sentence that includes a dishonorable discharge. We disagree.

In determining the appropriateness of a sentence, we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the sentence based upon the "'nature and seriousness of the offense [or offenses] and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 267-68 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). This requires a balancing of the offenses against the character of the offender.

Sentence comparison is also required in closely related cases involving highly disparate sentences. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001); *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). To be closely related, "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). Where this court finds sentences to be highly disparate in closely related cases, it must determine whether there is a rational basis for the differences between the sentences. *United State v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). A disparity between the sentences in closely related cases will warrant relief when it is so great as to exceed "'relative uniformity,'" or when it rises to the level of an "'obvious miscarriage of justice or an abuse of discretion.'" *United States v. Swan*, 43

M.J. 788, 792 (N.M.Ct.Crim.App. 1995)(quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)).

The appellant committed very serious offenses. After reviewing the entire record of trial and considering all the circumstances, to include the appellant's service and character, we find the appellant's approved sentence to be appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382, 384 (C.A.A.F. 2005); *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988); *Snelling*, 14 M.J. at 268; *see also United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

Assuming, without deciding, that the appellant's case is closely related to those of the other Marines named in the briefs,[1] we conclude that in relation to Cpl Robinson's approved sentence the appellant's sentence is not highly disparate. In relation to the approved sentence of Sgt Thornton, even if the appellant's sentence is highly disparate, the nature and number of the appellant's offenses comprise a rational basis for the disparity. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96. Therefore, we decline to grant relief.

Unreasonable Multiplication of Charges

In the appellant's second AOE, he asserts that his convictions for conspiracy to steal military property (Charge I, Specifications 1-4), sale of military property (Charge II, Specifications 1-4), and larceny of military property (Charge III, Specifications 1-2) represent UMC. The appellant avers that this court should consolidate the specifications of Charge I, dismiss Charge III and its two specifications, and reassess the sentence. We only agree that UMC occurred as it pertains to Specifications 1-4 of Charge I, requiring consolidation of the specifications and reassessment of the sentence.

We consider five factors in determining this issue: (1) Did the appellant object at trial; (2) Is each specification aimed at distinctly separate criminal acts; (3) Does the number of specifications misrepresent or exaggerate the appellant's criminality; (4) Does the number of specifications unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Quiroz,* 55 M.J. 334 (C.A.A.F. 2001), *on remand*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd,* 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

Applying the *Quiroz* criteria, we note that the appellant did not raise this issue at trial. "[T]he failure to raise the issue

[1] *United States v. Thornton*, No. 200300753, unpublished op. (N.M.Ct.Crim.App. 31 Aug 2004) and *United States v. Robinson*, No. 200300335, unpublished op. (N.M.Ct.Crim.App. 29 Oct 2004).

at trial suggests that the appellant did not view the multiplication of charges as unreasonable . . . [and] [t]he lack of objection at trial will significantly weaken the appellant's argument on appeal." *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000)(en banc), *remanded by*, 55 M.J. 334 (C.A.A.F. 2001)(internal citations omitted). Further, there is no evidence that the Government overreached or was guilty of abuse in the drafting, preferral, and referral of charges.

However, we find that Specifications 1-4 of Charge I, while not specifically misrepresenting the appellant's crimes, do exaggerate the appellant's crimes. Furthermore, the challenged specifications did unreasonably increase the appellant's punitive exposure. It is clear from the providence inquiry that the appellant was involved in an ongoing conspiracy with both Cpl Robinson and Sgt Thornton as co-conspirators. While the military judge considered Specifications 1 and 2 under Charge I to be multiplicious for sentencing, and he considered Specifications 3 and 4 to be multiplicious for sentencing, he did not consider Specifications 1 and 2 and 3 and 4 under Charge I together to be multiplicious for sentencing. Record at 128.

After applying the five non-exclusive factors we have established to examine claims of UMC, we are convinced that the appellant's specific misconduct reflected in Specifications 1-4 of Charge I should be consolidated into a single offense. *See Quiroz*, 57 M.J. at 583. As such, we shall take corrective action in our decretal paragraph.

Convening Authority's Action

In the appellant's third AOE, he summarily asserts that the convening authority erred in his combined action and court-martial promulgating order (CMO) when he failed to correctly title his CMO.[2] The appellant asserts no prejudice. The appellant nonetheless avers that this court should set aside the CA's action and remand his case for a new CA's action. We disagree.

The appellant is incorrect in that CA's combined action and CMO is correctly titled. *See* Gov't Motion to Attach Documents of 30 Jul 2004. Even if the appellant were correct in his assertion that the CA's combined action and CMO is not correctly titled, we would find no prejudice. Accordingly, we find the appellant's AOE to be without merit and decline to grant relief.

Conclusion

Accordingly, Specifications 2, 3, and 4 of Charge I are merged with Specification 1 of Charge I. Specification 1 of Charge I is amended by excepting all language after "Marine Corps," in the seventh line, substituting the following language,

[2] CA's Action and CMO Number 3-2003 of 5 Mar 2003.

"and Sergeant Jimmy A. Thornton, U.S. Marine Corps, to commit an offense under the Uniform Code of Military Justice, to wit: the stealing of both 5.56mm ammunition rounds and 9mm ammunition rounds, military property of the United States, and in order to effect the object of the conspiracy, the said Sergeant Johnson did steal approximately 12,800 5.56mm ammunition rounds and 1,670 9mm ammunition rounds, of a value of about $5,003.20, and delivered the said rounds into the possession of either Corporal Robinson or Sergeant Thornton, or both." The excepted language from Specification 1 of Charge I is dismissed. Specifications 2, 3, and 4 of Charge I are dismissed. We affirm the remaining findings, as modified.

Upon reassessment of the sentence, we affirm only so much of the adjudged and approved sentence as provides for confinement for 66 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We order that the supplemental promulgating order accurately report the findings of the appellant's court-martial as modified by this decision.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court