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

BEFORE

C.A. PRICE **R.C. HARRIS** **A. DIAZ**

UNITED STATES

v.

Nicolas REYES
Corporal (E-4), U.S. Marine Corps

NMCCA 200301064 Decided 29 April 2005

Sentence adjudged 13 December 2001. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

DIAZ, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of conspiracy to commit an assault, two specifications of assault and battery[1], and one specification of disorderly conduct, in violation of Articles 81, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 928, and 934. The appellant was sentenced to restriction for 23 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's four assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial

[1] With respect to specification 3 of Charge II (alleging an aggravated assault), the members found the appellant guilty of the lesser included offense of assault and battery, but did not enter proper findings by exceptions. The appellant, however, was not prejudiced by this error, as the record and the subsequent court-martial promulgating order accurately set forth the appellant's convictions.

to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Prosecution Exhibit 6/Ineffective Assistance of Counsel

In his first assignment of error, the appellant asserts that the military judge committed plain error by admitting an exhibit during sentencing (Prosecution Exhibit 6) that included a number of irrelevant documents. The appellant's second assignment of error is related to the first in that he claims his trial defense counsel was ineffective for failing to object to the admission of this exhibit. We agree that there was obvious error and that trial defense counsel's failure to object was deficient performance, but nevertheless decline to grant relief.

To obtain relief for plain error, the appellant must show that there was error, that the error was plain, and that the error materially prejudiced his substantial rights. *See United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). The standard for the related claim of ineffective assistance of counsel (IAC) is a two-prong test, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the appellant must show that counsel's performance was deficient, that is, that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the appellant must show that the deficient performance prejudiced the defense. This requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)(quoting *Strickland*, 466 U.S. at 694).

Prosecution Exhibit 6 is a 139-page document that the trial counsel represented to be "excerpts from Corporal Reyes' Service Record Book[.]" Record at 251. Tucked between the actual excerpts, however, are the following materials: (a) the entire military police investigation of the appellant's crimes, complete with witness statements, investigative summaries, and photographs; (b) a copy of the original uncleansed charge sheet and a certificate of service; (c) a letter from the trial counsel to the special court-martial convening authority (SPCMCA) requesting that he exclude certain periods of delay from the Government's speedy trial clock; (d) a copy of a federal indictment against the appellant for criminal fraud; (e) the appellant's written waiver of the Article 32, UCMJ, investigation; and (f) the SPCMCA's recommendation for trial by general court-martial. Significantly, the trial counsel also included the staff judge advocate's Article 34, UCMJ, advice to the general court-martial convening authority (GCMCA) wherein he recommends trial by general court-martial, and also advises the GCMCA that the appellant and his commanding officer had previously agreed to dispose of the charges via guilty pleas at a special court-martial, but that the appellant had subsequently reneged. *See* Prosecution Exhibit 6 at 8-10.

We are at a loss as to how the trial counsel could in good faith represent to the military judge that these materials were excerpts from the appellant's service record book without a further explanation as to their contents. We are equally perplexed by the trial defense counsel's failure to object to the introduction of these portions of the exhibit, and by the military judge's failure to inquire further before admitting the exhibit. Thus, we are in full agreement with the appellant that there was error and that this error was plain or obvious. *See Powell,* 49 M.J. at 463-65. Similarly, we agree that the appellant has made a sufficient showing that his counsel's failure to object to the exhibit was deficient performance. *See Strickland*, 466 U.S. at 687.

To prevail on a claim of plain error, however, the appellant also must show that the error materially prejudiced a substantial right. *Powell*, 49 M.J. at 463-65. Similarly, to prevail on his claim of IAC, the appellant must show that, but for his lawyer's deficient performance, there is a reasonable probability that the result of the proceedings (i.e. the sentence) would have been different. *United States v. Quick,* 59 M.J. 383, 387 (C.A.A.F. 2004).

The appellant's brief fails to make such a showing under either standard. Moreover, in conjunction with our own independent statutory duty to review this record, we have concluded that the appellant suffered no material prejudice from the error and that, notwithstanding trial defense counsel's deficient performance, there is no reasonable probability that the members' sentence would have been different. Our analysis follows.

First, the submission of the trial counsel's letter to the SPCMCA regarding excludable delay, as well as the SPCMCA's written recommendation to the GCMCA as to the proper disposition of the charges did not prejudice the appellant or alter the sentencing result, as these documents are completely irrelevant to anything that the members had to consider during sentencing. The same is also true of the appellant's Article 32, UCMJ, written waiver. As for the uncleansed charge sheet, the final cleansed version actually submitted to the members differed in only one material respect, that is, the final version of Specification 1 of Charge II alleged a simple assault and battery whereas the uncleansed specification alleged an aggravated assault. We find no basis for concluding that this difference impacted the members' sentencing consideration.

Next, the federal indictment against the appellant merely reinforced the actual federal conviction flowing from that indictment, which the government did properly introduce as Prosecution Exhibit 5. We have also carefully reviewed the military police investigative report. While its contents are inadmissible hearsay, we find that the information

contained in the report was already a matter of record as a result of the testimony and exhibits presented on the merits by both sides.

The report did contain two photographs of injuries inflicted on one assault victim that the military judge had earlier excluded as part of the prosecution's case in aggravation. Record at 252-53 (sustaining defense objections to Prosecution Exhibits 2 and 3). The military judge concluded that, because the appellant had not inflicted those injuries, they were not directly related to the offenses for which he should be punished. Record at 253.

That ruling, however, ignored that the appellant was convicted of a conspiracy to commit assault. As a result, it is entirely irrelevant that the appellant did not himself inflict all of the injuries sustained by that victim, as he remained "liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continue[d] and the [appellant] remain[ed] a party to it." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 5c(5). Thus, we decline to find plain error or prejudice merely because the appellant was deprived of the benefit of an incorrect evidentiary ruling by the military judge.

Finally, while the prosecution's admission of the appellant's offer to plead guilty was a plain and obvious violation of MILITARY RULE OF EVIDENCE 410[2], MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) we again examine this issue in the context of the stage of the proceedings where the error occurred. In this case, by the time the members considered the improper evidence, they had already convicted the appellant of all but one of the charges before them. The appellant has not shown us--and we fail to see--how evidence that, at worse, merely confirmed the members' findings of guilt, caused the appellant material prejudice or improperly infected the members' sentencing decision.

We note that the appellant's theory at trial was that he and his co-conspirators assaulted the various victims upon adequate provocation, in self-defense, or in defense of others. The members' findings, however, reflect their considered rejection of those defenses. We conclude that the subsequent admission during sentencing of the appellant's pretrial offer to admit guilt (as well as the other irrelevant documents included as part of Prosecution Exhibit 6), while a plain and obvious error, did not materially prejudice the appellant. Applying the prejudice prong of *Strickland,* we further find that there is no reasonable probability that, absent the error, there would have been a different sentencing result. Indeed, despite the appellant's claim to the contrary, the sentence in this case was, in our

[2] Rule 410 prohibits (except in limited circumstances not applicable here), the admission of pleas, plea discussions, and related statements.

view, extremely measured and lenient. Accordingly, we decline to grant relief.

Factual and Legal Sufficiency

The appellant also contends that the evidence presented at trial was factually insufficient to support his conviction for conspiracy to commit an assault as set forth in the specification under Charge I. We disagree.[3]

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court [of Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Reasonable doubt does not require that the evidence presented be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000).

As both parties acknowledge, a conspiracy "need take no particular form or be manifested in any formal words." *United States v. Jackson,* 20 M.J. 68, 69 (C.M.A. 1985). We have carefully considered the evidence presented at trial as to all the offenses, keeping in mind that the fact finder saw and heard the witnesses. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). We conclude that the evidence is both legally and factually sufficient to support the appellant's conviction for the charged offenses.

On the evening of 30 November 2000, the appellant and four of his friends walked into a restaurant in Washington, D.C. and, in short order, got into a scuffle with an opposing party of 6 men. The police arrived quickly, separated the two factions, and after a cursory investigation, elected to let each side go their own way. Apparently dissatisfied with the outcome of the initial round of pugilism, the appellant and his group spotted the opposing group's vehicle and, after an exchange of obscenities, began to give chase on a highway.

The evidence also showed that the appellant's vehicle (operated by one of the appellant's co-conspirators) attempted to pull in front of the opposing group's vehicle in an effort to stop it, and that the chase continued for a number of miles. When the opposing group's vehicle pulled off the highway, the appellant's vehicle followed. There was no evidence presented

[3] We will discuss both legal and factual sufficiency. *See* Article 66(c), UCMJ.

that the appellant voiced an objection to the chase or otherwise attempted to dissuade his cohorts. Instead, the evidence showed that the appellant's co-conspirators were angry and combative, and the appellant himself told investigators in a pretrial statement that his intentions were, "I don't know, I guess to fight." Prosecution Exhibit 1 at 4.

Once the vehicles stopped, the evidence showed that Sergeant (Sgt) D'Leon, an occupant of the other car who recognized the appellant from work, attempted to act as a peacemaker. In response, the appellant punched Sgt D'Leon in the nose, which ignited the fuse for the second brawl of the evening. It was during this second round that the appellant struck at least one other person with a baseball bat.

After carefully considering the evidence, the members excepted the names of several of the victims from the conspiracy specification, and also excepted two of the three overt acts alleged therein. The members also found reasonable doubt as to the appellant's liability for one of the assault and battery specifications. They were otherwise satisfied that the prosecution had met its burden to show that the appellant in fact formed an agreement with his cohorts to continue the fight that began in the restaurant and that he in fact punched Sgt D'Leon in the nose and struck another person with a baseball bat.

After conducting our independent review of the entire record, we conclude that the evidence is legally sufficient to support the appellant's conviction for all of the offenses, including the conspiracy to commit an assault. Additionally, we are personally convinced of the appellant's guilt beyond a reasonable doubt. Accordingly, we decline to grant relief.

Disparate Sentences

The appellant also contends that his sentence is inappropriately severe and disparate compared to the sentences in closely related companion cases and requests we, therefore, disapprove his bad-conduct discharge. We decline to grant the requested relief.

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. Cavallero,* 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). In this case, the appellant points to the cases of three of his coconspirators Lance Corporal (LCpl) Perez, LCpl Gutierrez, and Sgt Carrillo who received punitive action ranging from nonjudicial punishment (NJP) to a general court-martial. Appellant's Brief at 9. 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 (including the appellant's prior disciplinary history), and given the nature and seriousness of the offenses, we do not find the adjudged sentence to be inappropriately severe. Based on our review of the record, we will not substitute our judgment for that of the members who were present to see and hear all of the evidence. *Snelling*, 14 M.J. at 268. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Turning next to the issue of sentence disparity, we have compared the resolution of the three related cases. We note first that the appellant turned down an offer to plead guilty at a special court-martial and instead opted to contest the charges at a general court-martial. That fact alone distinguishes his case from those of LCpl Perez (who pled guilty at NJP) and LCpl Gutierrez (who pled guilty at a summary court-martial).

We further find that LCpl Perez was a bit player in the second brawl, whereas the appellant was the catalyst for that event. Admittedly, LCpl Gutierrez (who initiated the chase and retrieved the baseball bat from the trunk of his car) appears to be as culpable as the appellant, but he (unlike the appellant) did not actually wield a weapon to strike others nor had he been convicted in a civilian federal district court of a separate conspiracy to commit criminal fraud.

The third co-conspirator (Sgt Carrillo), was convicted of similar offenses at a military judge alone contested general court-martial, and received a reduction to pay grade E-4 and 60 days confinement. Once again, however, there is no evidence that Sgt Carrillo had any prior disciplinary history and certainly no evidence that he had previously suffered a civilian federal conviction for criminal fraud.

In short, even assuming *arguendo* that the appellant's sentence is highly disparate to that of his coconspirators, the information available to us provides good and cogent reasons for the disparity. Accordingly, we decline to grant relief.

Error in Sentencing Instructions

We next resolve an error not raised by the appellant. Specifically, the military judge incorrectly advised the members that they could impose a dishonorable discharge as part of their sentence. Although the original charges lodged against the appellant (which included two separate specifications of aggravated assault) authorized the imposition of a dishonorable discharge[4], the members found the appellant guilty of two lesser included offenses of assault and battery, one specification of conspiracy to commit an assault, and one specification of disorderly conduct. None of these offenses authorizes the imposition of a dishonorable discharge. *See* MCM, Part IV, ¶¶ 5e, 54e(2), and 73e(1).

In the absence of an objection, we review deficiencies in an instruction for plain error. *See United States v. Glover*, 50 M.J. 476, 478 (C.A.A.F. 1999). Here again, although there was error and that error was obvious, we conclude that the appellant was not substantially prejudiced. We note first that the appellant did not receive a dishonorable discharge and so the erroneous instruction had no actual impact on his sentence. We also note that the military judge correctly instructed the members in all other respects relative to sentencing.

Moreover, "[a]bsent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *United States v. Thompkins,* 58 M.J. 43, 47 (C.A.A.F. 2003). We do not presume that the members settled on a bad-conduct discharge as part of a compromise verdict. Instead, we presume that the members determined that a sentence which included a bad-conduct discharge "best serve[d] the ends of good order and discipline in the military, the needs of this accused, and the welfare of society." Record at 282. Thus, we find that the error had no impact on the members' sentence. We further find that the convening authority would not have approved a lesser sentence had he been informed of the error. The error is, therefore, harmless. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Missing Appellate Exhibit

Finally, we note that the record contains an Appellate Exhibit V (captioned "Defense Proposed Voir Dire") from an entirely different case. While we could order the Government to produce the correct version of Appellate Exhibit V, we see no reason for doing so here. The appellant has not raised error relating to the selection or the *voir dire* of members in this case and our review of the record does not disclose any such error. Accordingly, we decline to order the production of the

[4] *See* MCM (2000 ed.), Part IV, ¶¶ 54e(8) and 73e(1).

missing appellate exhibit and instead direct the Clerk to remove the existing Appellate Exhibit V from this record.

Conclusion

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

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court