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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Kenyatta F. PEPPERS
Sergeant (E-5), U.S. Marine Corps

NMCCA 200301247 Decided 26 August 2005

Sentence adjudged 2 August 2002. Military Judge: J.P. Colwell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Force Service Support Group, U.S. Marine Corps Forces Atlantic, Camp Lejeune, NC.

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of officer members, of possession of cocaine, distribution of cocaine, possession of methylendeioxmethamphetamine, and distribution of methylendeioxmethamphetamine, all in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant submitted six assignments of error.[1] We have considered the record of trial, the appellant's assignments of

[1] I. SENTENCE APPROPRIATENESS AND SENTENCE DISPARITY INVOLVES CONSIDERATION OF THE ACCUSED ON THE BASIS OF THE NATURE AND SERIOUSNESS OF THE OFFENSE AND THE CHARACTER OF THE OFFENDER. APPELLANT'S SENTENCE FOR WRONGFUL DRUG DISTRIBUTION WAS EIGHT YEARS HIGHER AND A MORE SEVERE DISCHARGE THAN THE

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

Facts

The appellant, a sergeant (E-5), was identified as a suspect in an ongoing drug investigation when he was present during a controlled purchase of drugs by a cooperating witness for the Naval Criminal Investigative Service (NCIS). At trial, four witnesses testified that the appellant possessed and distributed methylendeioxmethamphetamine (ecstasy) and cocaine in their presence. Other witnesses testified to the appellant's presence where drugs were being distributed and to his open discussions of drug activity with them. The appellant presented evidence and testimony regarding his good military character. He did not testify.

Sentence Disparity and Appropriateness

In the appellant's first assignment of error, he asserts his sentence is inappropriately severe and disparate to his co-

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ACCUSED IN THE COMPANION CASES. IS THIS SENTENCE BOTH APPROPRIATE AND DISPARATE?

II. THE MILITARY JUDGE HAS THE DUTY OF PROPERLY INSTRUCTING THE MEMBERS. WHILE EVIDENCE WAS RAISED AS TO APPELLANT'S DELIBERATE AVOIDANCE, NO INSTRUCTION WAS GIVEN ON KNOWING POSSESSION. IS THIS ERROR?

III. THE QUESTION OF IMPLIED BIAS IS VIEWED "THROUGH THE EYES OF THE PUBLIC." THE CONVENING AUTHORITY AND ACTING CONVENING AUTHORITY DIRECTED INPUT INTO THE FITNESS REPORTS OF THE EXACT AMOUNT OF MEMBERS NECESSARY TO CONVICT APPELLANT. DOES THIS SITUATION "PLACE AN INTOLERABLE STRAIN ON PUBLIC PERCEPTION OF THE MILITARY JUSTICE SYSTEM?"

IV. ARTICLE 112(A), UCMJ PROHIBITS THE WRONGFUL POSSESSION AND DISTRIBUTION OF SUBSTANCES LISTED IN ARTICLE 112(A) OR LISTED IN SCHEDULES I THROUGH V OF THE CONTROLLED SUBSTANCES ACT. SPECIFICATIONS 2 AND 4 OF CHARGE I DO NOT LIST A DRUG THAT IS A SCHEDULE I CONTROLLED SUBSTANCE OR MENTIONED IN ARTICLE 112(A). DO THE SPECIFICATIONS FAIL TO STATE AN OFFENSE? (RAISED PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982)).

V. INEFFECTIVE ASSISTANCE OF COUNSEL IS DEFICIENT PERFORMANCE THAT PREJUDICED THE APPELLANT. TRIAL DEFENSE COUNSEL'S PRIMARY ERROR WAS TO MOVE TO RECONSIDER CHARGES THAT THE MILITARY JUDGE HAD DISMISSED AND FAILED TO PROPERLY ADVISE APPELLANT OF THE RAMIFICATIONS. WAS APPELLANT'S REPRESENTATION EFFECTIVE? (RAISED PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982)).

VI. WHERE THE MAIN TWO GOVERNMENT WITNESSES TESTIFIED PURSUANT TO A PRE-TRIAL (SIC) AGREEMENT, DOES THE EVIDENCE FACTUALLY SUPPORT APPELLANT'S CONVICTION? (RAISED PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982)).

actors' sentences. He asks us to consider this issue *de novo* and to grant sentence relief. We decline to do so.

The appellant confuses our broad responsibility under Article 66, UCMJ, to approve only those portions of the findings and sentence that, based on the entire record, we feel "should be approved," with our more narrow responsibility under that Article to affirm only those portions of the findings and sentence that are "correct in law and fact." Article 66(c), UCMJ. Article 66 requires us to do both. We are required to make a *de novo* determination as to whether the sentence "should be approved" in each and every case that comes before us for review and approve only that part of the "sentence [that] *'should be approved,'* based on all the facts and circumstances reflected in the record." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

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 and the character of the offender.'" *United States v. Snelling*, 14 M.J. 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 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)).

Applying these criteria, we consider the cases of Private (Pvt) Simmons and Pvt Martinez, both also convicted and sentenced by general courts-martial for distribution of illegal drugs, as closely related because the charges all arose from essentially the same drug transactions and incidents. Pvt Simmons and Pvt Martinez were both sentenced to a bad-conduct discharge, confinement for 18 months, total forfeitures, and reduction to pay grade E-1. Assuming without deciding that the sentences ae highly disparate, we find that the facts in each case are sufficiently different to explain and justify the different

sentences. We note that both Pvt Simmons and Pvt Martinez cooperated with law enforcement and availed themselves of their right to plead guilty. Additionally, the appellant was a superior noncommissioned officer in a position of leadership over the two privates. Considering all the circumstances, to include the appellant's evidence of good military character, we find the appellant's sentence is appropriate and does not "rise to the level of an obvious miscarriage of justice or an abuse of discretion." *Swan*, 43 M.J. at 792.

The charges of which the appellant was convicted accurately and fairly reflect his criminal conduct and were deserving of the sentence adjudged. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *Snelling*, 14 M.J. at 268.

Adequacy of Counsel

In the appellant's fifth assignment of error, he claims that his trial defense counsel was inadequate. The appellant bases this claim, in large part, on his counsel's request to the military judge to reconsider a favorable ruling dismissing two specifications for failure to state an offense and to allow the appellant to waive a major modification to those specifications. The military judge had, sua sponte, raised the issue of whether two specifications that used the street name "ecstasy" rather than the pharmaceutical term "methylendeioxmethamphetamine" were sufficient under Article 112a, UCMJ. The term "ecstasy" does not appear either as a listed substance under Article 112a or in the numbered schedules of substances under the Controlled Substances Act of 1970, 21 U.S.C. § 812.

This issue is without merit. The military judge spent considerable time discussing the issue of double jeopardy and the possibility that the appellant could be tried anew for the dismissed specifications. He correctly pointed out the possibility that the appellant could end up with two court-martial convictions instead of one, and left the decision to allow the Government to modify the specifications completely within the control of the appellant. The military judge also provided a detailed and exemplary explanation of this issue to the appellant, who made an informed decision on the record to go forward with the modified specifications, rather than risk a second court-martial conviction. Record at 384-86.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any

rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

The evidence of guilt in this case was overwhelming and is both legally and factually sufficient. The witnesses provided a uniform and detailed description of the appellant's drug activities. The nontestimonial evidence presented corroborated the witnesses' testimony. The efforts of the trial defense counsel to impeach the witnesses were unsuccessful. This court is convinced beyond reasonable doubt of the appellant's guilt.

The remaining three assignments of error are without merit.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved below, are affirmed.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court