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

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **D.A. WAGNER**

UNITED STATES

v.

Robert L. LOEH
Lieutenant Commander (O-4), U.S. Navy

NMCCA 200101757 Decided 22 November 2004

Sentence adjudged 23 January 2001. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

Maj ANTHONY WILLIAMS, USMC, Appellate Defense Counsel
Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of conspiracy to possess and distribute 3,4-methylenedioxymetham-phetamine (ecstasy) and ketamine; unauthorized absence; violation of general regulations regarding ship-board possession of alcohol and fraternization (3 specifications); distribution of ecstasy and ketamine; possession of ecstasy with intent to distribute; possession of ketamine and lysergic acid diethylamide (LSD); use of ecstasy and LSD; assault consummated by battery; solicitation to commit an offense (2 specifications); and using a communication facility to commit an offense under 21 U.S.C. §843(b), in violation of Articles 81, 86, 92, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 892, 912a, and 934. The appellant was sentenced to confinement for 10 years, forfeiture of all pay and allowances, and a dismissal. The convening authority approved the sentence as adjudged, but in accordance with the pretrial agreement, suspended confinement in excess of 5 years.

We have examined the record of trial and the assignments of error[1] submitted by the appellant under *United States v.*

[1] The following allegations of error are raised by appellant:

1. The appellant was the target of prosecutorial misconduct by trial counsel, LT H., JAGC, USNR, when he violated rule 3.8(4) of the Rules of Professional Conduct (JAGINST 5803.1) in that he intentionally failed to disclose a sworn statement provided by IT3 L., USN, that negated the guilt of the appellant with regard to the conspiracy charge and could have been used to impeach the credibility of the one and only witness called by the Government during the sentencing phase of the court-martial.

2. Whether the Commanding Officer, USS CONSTELLATION exerted unlawful command influence over the Article 32 Investigation when he knowingly administratively separating two alleged co-conspirators one month before the date of the Article 32 hearing, after they had provided sworn statements against the appellant, without giving notice to Article 32 Investigating Officer and defense counsel.

3. Was the appellant the victim of selective prosecution by Commanding Officer, USS CONSTELLATION for exercising his rights to a civilian attorney and submitting a resignation to the Secretary of the Navy?

4. Was the appellant denied effective assistance of a "conflict free" defense counsel during the post-trial phase of his court-martial when he was forced to utilize his trial defense counsel, over his objections, who, immediately following the completion of the court-martial had been permanently transferred to the staff judge advocate's office of the flag officer who had signed the search authorization for the appellant's blood, which was the basis of Charge Four, Specification Eight?

5. Did the appellant receive a disproportionately harsh sentence, as compared to that of his convicted co-conspirators and self-admitted co-conspirators?

6. Was the appellant prejudiced in the post-trial processing of his general court-martial when he was transferred from the Miramar Consolidated Brig to the United States Disciplinary barracks before his record of trial had been authenticated, before the submission of his R.C.M. 1105 and 1106 matters, and before the final action of the convening authority?

7. Did the military judge commit harmful error when he determined that the appellant's general court-martial was lawfully convened when the appellant was senior in both rank and/or grade to five of the eight members listed on the court-martial convening order?

8. Was the appellant prejudiced by the convening authority's failure to personally approve the results of the court-martial as required by R.C.M. 1107(f)(1)?

9. Was the staff judge advocate disqualified from providing the R.C.M. 1106 recommendation as a result of his pretrial advice in which he recommended the referral of charges that both the Article 32 Investigating Officer and the special court-martial convening authority had recommended be dismissed, and his involvement with the grant of leniency and testimonial immunity to the sole government witness to testify?

10. Was the convening authority disqualified in acting on the appellant's court-martial as a result of: 1) his role as the appellant's accuser and; 2) his pretrial grant of leniency and testimonial immunity to the appellant's co-conspirator, who was the only government witness that provided testimony at the appellant's court-martial?

11. Did the appellant receive ineffective assistance of counsel, when under the advice of trial defense counsel the appellant plead guilty to the knowing use of LSD (Charge IV, Specification 8), when the only Government evidence was a chemical analysis of the appellant's blood, conducted by a non-DoD certified lab, with a result that fell below the minimum required for a positive result?

12. Did trial counsel fail to perform his duty with "due diligence" when he failed to ascertain and disclose to defense counsel that the DoD standard for a positive test result for the presence of LSD was .20 Ng/ml, which was higher than the test result offered as proof of the appellant's use of LSD at his Article 32 hearing?

13. Did trial counsel fail to perform his duty with "due diligence" when he failed to ascertain and disclose to defense counsel that the undercover sale that was used as the "trigger" for the anticipatory search warrant was conducted in violation of 10 U.S.C. §375, Department of Defense Directive 5525.5, and SECNAVINST 5820.7B?

14. Did the USS CONSTELLATION staff judge advocate abuse the concurrent jurisdiction that was granted in Solorio v. U.S., 107 S.Ct. 2924 (as well as violate the intent of 28 USC § 2283) when he successfully pressured the San Diego District Attorney to withdraw the criminal complaint against the appellant **after** the appellant had entered an unconditional plea of guilty before a State of California Superior Court judge; thereby interfering with the appellant's right to a speedy trial as guaranteed by the Sixth Amendment to the U.S. Constitution and eliminating the appellant's "presumption of innocence"?

Grostefon, 12 M.J. 431 (C.M.A. 1982). 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. Art. 59(a) and 66(c), UCMJ.

Trial Counsel's Failure to Disclose Statement

The appellant asserts that the prosecutor committed prosecutorial misconduct by intentionally failing to disclose to the defense a sworn statement of one of the appellant's two co-conspirators. The appellant does not assert any specific request for relief.

The appellant and his two co-conspirators were tried separately for their respective roles in a criminal enterprise involving the distribution of controlled substances. On 20 October 2000, the Article 32, UCMJ, Investigating Officer completed a joint hearing regarding the charges preferred against the appellant and Machinist's Mate Third Class (MM3) Dustin Larck, USN, one of the co-conspirators. On 13 November 2000, the Article 32 Investigating Officer's Report was completed and forwarded to the Commanding Officer, USS CONSTELLATION. That report was then forwarded to Commander, Navy Region Southwest, who referred charges against the appellant on 4 December. On 9 November, the other co-conspirator, Information Systems Technician Third Class (IT3) Matthew A. Lehnhoff, USN, provided a sworn statement as part of a pretrial agreement offer in his pending court-martial. This offer was accepted by the Commander, Amphibious Group THREE, who referred the charges against IT3 Lehnhoff to a special court-martial on 20 December. On 8 January 2001, the appellant entered into a pretrial agreement with Commander, Navy Region Southwest. MM3 Larck testified at the appellant's court-martial. IT3 Lehnhoff did not. The appellant's court-martial was completed on 23 January. The appellant then testified at IT3 Lehnhoff's special court-martial on 2 February. The appellant now states that he first became aware of the sworn statement given by IT3 Lehnhoff on 2 February while testifying at that special court-martial. It remains unclear whether the trial defense counsel knew of the statement before trial.

Failure by the prosecutor to disclose required evidence to the defense will constitute a constitutional due process violation only where the evidence is "material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Such evidence will be deemed material only if there is a reasonable probability that the existence of the evidence would undermine

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15. Should the appellant receive twenty-five days of confinement credit for the period 5 March through 6 August 2001; a period when it was judicially determined that the United States Disciplinary Barracks was in violation of the Eighth Amendment to the U.S. Constitution, 10 USC §855, 10 USC §858, and SECNAVINST 1640.B?

16. Does the combination of the appellant's asserted assignment of errors (1) through (14) PRESENT THE APPEARANCE of a fundamentally unfair judicial proceeding?

confidence in the outcome of the trial or that disclosure of the evidence could have engendered a different result. *Id.*

It is not necessary in the instant case to determine whether the trial counsel failed to provide the sworn statement to the appellant prior to his general court-martial. Assuming, arguendo, that it was not disclosed, the appellant fails to state any prejudice suffered from the non-disclosure. In the first instance, the appellant claims that the withheld statement rebuts the charge of conspiracy against him and could have been used to impeach MM3 Larck's testimony. Neither assertion is correct. While IT3 Lehnhoff does not disclose his role in the conspiracy in his statement, he also does not deny that the conspiracy existed or provide any evidence that the conspiracy did not exist. Additionally, the written statement of one co-conspirator cannot be used to impeach the testimony of another co-conspirator.

Sentence Appropriateness

The appellant contends that his sentence is disparate compared to the sentences in closely related companion cases and he requests that we, therefore, reduce his sentence to 26 months confinement. 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. Cavallaro,* 14 C.M.R. 71, 74 (C.M.A. 1954). In the normal course of events, we must determine sentence appropriateness without regard to sentences in other cases. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). 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 are required to afford relief where the sentences are "highly disparate." *United States v. Kelly,* 40 M.J. 558, 570 (N.M.C.M.R. 1994). Under the circumstances of this case, involving three service members charged with conspiracy to distribute illegal drugs, we find that the cases are closely related. *See United States v. Lacy,* 50 M.J. 286 (C.A.A.F. 1999). 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.

The appellant, in support of his guilty pleas, admitted to participating in a conspiracy to distribute illegal drugs with two enlisted service members. The appellant used his residence as the base of operations for the drug ring and funded much of the activity of the conspirators himself. The appellant was the

central figure in the conspiracy and, as a commissioned officer, bore special responsibility for his actions in fraternizing with enlisted personnel in a criminal enterprise. To the extent that the sentences of the co-conspirators are disparate, the differences are based on the respective roles each played in the drug ring and the different positions of responsibility each held in the Navy.

Remaining Assignments of Error

We have carefully considered, and rejected as having no merit, all remaining allegations of error submitted by appellant.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are approved.

Chief Judge DORMAN and Senior Judge CARVER concur.

For the Court

R.H. TROIDL
Clerk of Court