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

BEFORE

C.L. CARVER **W.L. RITTER** **R.W. REDCLIFF**

UNITED STATES

v.

James C. CLARK
Mess Management Specialist Seaman (E-3), U.S. Navy

NMCCA 200101900 Decided 9 March 2004

Sentence adjudged 30 April 2001. Military Judge: D.A. Wagner. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

Capt PHILLIP D. SANCHEZ, USMC, Appellate Defense Counsel
Maj RAYMOND E. BEAL, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to commit larceny,[1] two specifications of unauthorized absence, larceny on divers occasions of a value in excess of $100, and seven specifications of making and uttering bad checks, in violation of Articles 81, 86, 121, and 123a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 921 and 923a. After announcement of the findings, the military judge conditionally dismissed all seven of the bad check specifications as being multiplicious with the larceny offense. The appellant was sentenced to a bad-conduct discharge and confinement for 22 months. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 14 months.

[1] The appellant pled guilty to three specifications of conspiracy to commit larceny and three specifications of larceny on divers occasions. However, after acceptance of the pleas, but prior to the announcement of findings, the military judge consolidated the three specifications of conspiracy into one specification and consolidated the three specifications of larceny into one specification.

The appellant contends that there was improper rebuttal evidence during sentencing and that the sentence was too severe.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply, 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.

Rebuttal Evidence

The appellant asserts that the military judge erred when he admitted, over objection, Government rebuttal evidence that, after the dates of the charged misconduct, he uttered four additional bad checks to the owner of a civilian gift shop and failed to make restitution after having promised to do so. We find error, but decline to grant relief.

"A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion. His or her decision to admit evidence will not be overturned on appeal 'absent a clear abuse of discretion.'" *United States v. Johnson,* 46 M.J. 8, 10 (C.A.A.F. 1997)(quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)).

During sentencing, the appellant presented testimony, through a witness, that he had rehabilitative potential. During cross-examination of that witness, the trial counsel did not test the basis for that opinion by asking if the witness was aware of other uncharged misconduct. Instead, in rebuttal, the Government was permitted to present the testimony of a civilian store owner regarding specific instances of uncharged misconduct to show that the appellant lacked rehabilitative potential.[2] The store owner was not asked, and did not testify, as to any opinion regarding the appellant's lack of rehabilitative potential. The military judge erred by allowing such evidence.

"As to relevancy, the appellant put his rehabilitative potential in issue, and in so doing, prior instances of similar misconduct became relevant to test the basis of his witnesses' opinions concerning his potential for rehabilitation. Extrinsic evidence of that misconduct is not admissible, however, to rebut an opinion as to an accused's rehabilitative potential. *United States v. Driver,* 36 M.J. 1020, 1022 (N.M.C.M.R. 1993)(internal citations omitted).

Nonetheless, in light of the seriousness of the offenses, and the absence of specific prejudice, we find that the error was harmless and had no effect on the sentence adjudged by the court.

[2] The Government also offered the evidence to rebut a portion of the appellant's unsworn statement, but the military judge only allowed the evidence to rebut evidence that the appellant had rehabilitative potential.

Sentence Appropriateness

In his second assignment of error, the appellant contends that his sentence was inappropriately severe. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (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*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

The appellant points out that, at trial, he expressed remorse for his actions and that funds were being taken from his pay to make restitution to the military exchanges that were the victims of his misconduct.

Nonetheless, we view his misconduct as quite serious. The appellant and his co-conspirator wrote nearly 140 bad checks for which they wrongfully received about $38,000. After dismissal of some offenses and consolidation of others, the maximum sentence that could be adjudged included a dishonorable discharge and confinement for 10 years and 7 months. The appellant was only sentenced to a bad-conduct discharge and confinement for 22 months. Pursuant to a pretrial agreement, the convening authority suspended confinement over 14 months.

After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *Healy*, 26 M.J. at 395-96; *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. *Healy*, 26 M.J. at 395-96.

Conclusion

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

Judge RITTER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court