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.

Eric K. MYERS
Sergeant (E-5), U.S. Marine Corps

NMCCA 200300704 Decided 16 November 2004

Sentence adjudged 28 February 2002. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Air Wing, Marine Corps Air Station, Iwakuni, Japan.

LT REBECCA S. SNYDER, JAGC, USNR, Appellate Defense Counsel
LtCol MICHAEL SHIRING, USMCR, Appellate Government Counsel
Maj RAYMOND 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 carnal knowledge, indecent acts with a person under 16 years of age, and two specifications of adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to a dishonorable discharge, confinement for 4 years, total forfeiture of pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended all confinement over 14 months.

After carefully considering the record of trial, the appellant’s assignment of error that the sentence was inappropriately severe, and the Government’s response, we conclude that the findings are correct in law and fact, but that the sentence must be reduced. We will take remedial action in our decretal paragraph. Otherwise, we find no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sentence Severity

The appellant contends that the sentence to four years of confinement and a dishonorable discharge is inappropriately severe and highly disparate to the sentences in closely related cases. He therefore requests that we mitigate the dishonorable discharge to a bad-conduct discharge. We agree.

"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*, 27 C.M.R. 176, 180-81 (1959)).

Further, a Court of Criminal Appeals must grant sentence relief if it finds that the appellant's sentence is highly disparate with closely related cases and that there is no rational basis for the difference in the sentences in the other cases.

> [A]n appellant bears the burden of demonstrating that any cited cases are "closely related" to his or her case and that the sentences are "highly disparate." If the appellant meets that burden, or if the court raises the issue on its own motion, then the Government must show that there is a rational basis for the disparity.

United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999). Cases are closely related where "coactors [are] involved in a common crime, servicemembers [are] involved in a common or parallel scheme, or [there is] some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.*

Facts

At the time of the offenses, the appellant was a married 24-year-old Marine sergeant and the father of three small children. He was serving an unaccompanied tour of duty and residing in the barracks at Marine Corps Air Station, Iwakuni, Japan. He had served 6 years of otherwise excellent military service.

During August of 2001, the appellant had sexual intercourse with a female lance corporal who was apparently single. There is no indication in the record that she was disciplined for adultery or any other offense. During September of 2001, the appellant had sexual intercourse 4 times with a married female sergeant. The female sergeant later received nonjudicial punishment for adultery.

During that same month, the appellant met Miss E, who correctly told him that she was 14 years of age. During a work break while moonlighting at the base movie theatre, the appellant took her to a secluded area behind the movie screen where he kissed her, rubbed his hands on her body, and fondled her breasts. Later that month, the appellant went to her apartment while her parents were out and had sexual intercourse with her.

On different occasions, two other Marines also had sexual relations with Miss E. Each pled not guilty at separate general courts-martial, but were convicted of sexual relations with Miss E. We have not been advised of the original allegations against either accused. Lance Corporal (LCpl) Withrow was convicted of carnal knowledge with Miss E. He was married and had one child. He was sentenced to confinement for 9 months, total forfeitures of pay and allowances, and reduction to pay grade E-1.

Sergeant (Sgt) Johnson was convicted of indecent acts with Miss E. He was married and had more than one child. He was sentenced to receive a punitive letter of reprimand and to be reduced to pay grade E-4.

The appellant negotiated a pretrial agreement that required the convening authority (CA) to suspend confinement over 18 months. However, in his recommendation to the convening authority, the staff judge advocate recommended that the CA grant additional clemency by suspending confinement over 14 months because of the "significant disparity" in the sentences of the three Marines and because the appellant was the only one of the three who admitted his culpability. Staff Judge Advocate's Recommendation of 2 Aug 2002.

We must also note that the trial counsel specifically declined on the record to present any evidence in aggravation as to any adverse effect on the victim as a result of the appellant's misconduct. Record at 27.

We find that the three cases are closely related and that their sentences are highly disparate. But we also find that the appellant was convicted of more misconduct than were the other two Marines, thus reflecting a rational basis for much of the difference in their sentences.

Nonetheless, after reviewing the entire record and considering the closely related cases, we find that the adjudged sentence is inappropriately severe for this offender.

Conclusion

Accordingly, the findings are affirmed. We affirm so much of the sentence as provides for a bad-conduct discharge,

confinement for 14 months, total forfeiture of pay and allowances, and reduction to pay grade E-1.

Chief Judge DORMAN and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court