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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Jason R. DUFF
Mess Management Specialist Third Class (E-4), U.S. Navy

NMCCA 200301924 Decided 20 December 2004

Sentence adjudged 12 December 2002. Military Judge: J.A. Wynn. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Submarine Group TEN, Kings Bay, GA.

LT ROBERT E. SALYER, JAGC, USNR, Appellate Defense Counsel
Capt RICHARD VICZOREK, USMC, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel
LT C.C. BURRIS, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HEALEY, Judge:

A general court-martial composed of a military judge, sitting alone, convicted the appellant, following the entry of mixed pleas, of three specifications of conspiracy and three specifications of larceny, in violation of Articles 81 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 921. The sentence consisted of confinement for 36 months, forfeiture of all pay and allowances, 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 assignments of error,[1] the Government's responses, the

[1] I. The Government failed to comply with statutory requirements in that the record of trial does not contain, (1) the rulings of the military judge on several motions, (2) a verbatim transcript of the motions rulings, (3) Appellate Exhibits (AE) V, VI, & VIII, or, (4) Prosecution Exhibit (PE) 13.

II. There was a denial of speedy post-trial review in that 353 days passed before the case was docketed at the Navy-Marine Corps Court of Criminal Appeals.

Government's motions to attach,[2] the appellant's reply, the appellant's petition for extraordinary relief, and the appellant's motion to expedite appellate review. We conclude that the findings and the 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.

Record of Trial Omissions

The appellant maintains that the Government failed to comply with the statutory requirement for a complete record of the proceedings and testimony in a general court-martial. Specifically, he contends that the record does not contain, (1) the rulings of the military judge on several motions, (2) a verbatim transcript of the motions session in which those motions were ruled on, (3) Appellate Exhibits (AE) V, VI, and VIII, and (4) Prosecution Exhibit (PE) 13. The appellant asks that we set aside the findings as to Specifications 1 and 3 of Charge I and Specifications 2 and 4 of Charge II and reassess and affirm only so much of the sentence that extends to 6 months of confinement and reduction to the lowest enlisted pay grade. We do not concur.

A complete record of the proceedings and testimony must be prepared for a general court-martial resulting in a discharge. Art. 54(c)(1), UCMJ. A verbatim transcript is required in any trial resulting in a bad-conduct discharge. RULE FOR COURTS-MARTIAL 1103(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). A verbatim transcript includes all proceedings, including sidebar conferences, arguments of counsel, rulings and instructions by the military judge, and matters which the military judge orders stricken from the record or disregarded. *Id.*, Discussion. A complete record of trial is not necessarily a verbatim record. *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R. 179, 181 (C.M.A. 1953)). Technical violations of R.C.M. 1103(b)(2) do not require reversal in every case; rather, an incomplete or non-verbatim record raised a rebuttable presumption of prejudice. *United States v.*

III. The adjudged confinement was inappropriately severe given the disparate sentences awarded, the circumstances of the case, and the mitigating evidence.

IV. The promulgating order fails to comply with RCM 1114(c)(1) because it lists and misstates Specification 2 of Charge I and misstates Specification 3 of Charge II.

[2] The Government filed motions to attach on 6 May 2004, 27 September 2004, 6 December 2004, and 7 December 2004. The following documents were attached to the record: AE V, AE VI, AE VIII, PE 13, a declaration from the trial counsel, an affidavit from Judge Garaffa, an affidavit from the trial counsel, an affidavit from the defense counsel, affidavits from two court-reporters, numerous emails, and court-reporter notes.

Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999); *see also United States v. Santoro*, 46 M.J. 344, 346 (C.A.A.F. 1997).

Whether a record of trial is incomplete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). A transcript without a charge sheet, convening order, and sentencing exhibits is not complete. *See Santoro*, 46 M.J. at 346. A transcript missing part of the providence inquiry, rights advisement, and waiver of those rights renders a record incomplete. *See United States v. Martin,* 5 M.J. 657, 659 (N.C.M.R. 1978). A single missing prosecution exhibit can render the record incomplete, if it is of sufficient import to the findings in a contested case. *See McCullah*, 11 M.J. at 237.

In the appellant's case the initial session and the arraignment were held 30 July 2002 with Captain J. V. Garaffa, JAGC, United States Navy, presiding as the military judge. A defense motion for appropriate relief regarding language not properly referred was before the court. Appellate Exhibit I. The Government withdrew the disputed language from the charge sheet and the military judge secured assurances from both counsel that there was no longer an issue with the referral. Record at 8-10. No other motions were offered at this session. The military judge announced the court would be recessed until 7 October 2002. Record at 11. The 30 July 2002 session consisted of 12 pages and was authenticated on 21 February 2003. Record at 13.

According to the record, the next session of the court was held on 10 December 2002 with Captain J. Wynn, JAGC, United States Naval Reserve, as the military judge. At the outset of this session, all parties to the trial were identified, counsel rights were reviewed, voir dire was solicited, the appellant elected court-martial composition, the court-martial was assembled, and the military judge summarized a R.C.M. 802 session held that day. The Government counsel announced Charge I, Specification 2 had been withdrawn and the appellant entered mixed pleas. Record at 14-22. Prior to conducting a providence inquiry, the following exchange occurred:

> TC: Your Honor, I believe at the time of arraignment I didn't hear the defense indicate whether they had any motions at this time.
>
> IMC: We have no motions at this time, your Honor.

Record at 26. The military judge then conducted the providence inquiry. Record at 26-54. Following the providence inquiry, the following exchange occurred:

> TC: Yes, sir, your Honor. While we have a moment, did you want to put some of the Appellate Exhibits into

> the record? We have some motions and some response that are not yet part of the record.
>
> MJ: Any preliminary matters at this time would be an appropriate time to do so. We have a few moments.
> . . . .
>
> TC: Okay. Your Honor, I'm marking as Appellate Exhibit II, a government Motion in Limine regarding the admissibility of documentary evidence with attached affidavits of the custodian. I'm handing Appellate Exhibit II to the bailiff to hand to the military judge.

Record at 55. The trial counsel then continued marking and offering AE II – XIII. Record at 55-60. The military judge addressed each AE individually and in numerical sequence. He secured responses from the individual military counsel (IMC) that defense had no objection to AE II, III, IV and VII. As to AE V, a Government Motion in Limine to preclude inquiry into pretrial agreements with government witnesses, the appellant entered his opposition via AE VI, and then the Government withdrew their motion. Record at 57. AE VIII contains 5 pages of an email chain between government counsel, Judge Garaffa, the defense counsel, and a Judge Cantanese. According to the email Judge Cantanese was docketed to hear the appellant's case 9-13 December 2002. The email discussed background information concerning trial locations, times, and witnesses, as well as one modification to the charge sheet. Judge Cantanese made no rulings. There was no assertion that he subsequently was detailed or had any part in the appellant's trial.

AE IX – XII pertain to the only contested motion, the appellant's motion for appropriate relief to remove Commander, Submarine Group TEN as the convening authority. AE IX was served on the Government on 25 October 2002. The Government's response was served on the detailed defense counsel on 6 November 2002. A supplemental brief was served on the Government on 6 November 2002. Both the Government and the defense counsel in their 6 November 2002 briefs specifically state they were not requesting oral argument. Judge Garaffa's denial, AE XII, is undated. The following exchange occurred after AE XI was offered:

> MJ: Okay. All right. And you have a supplemental response too?
>
> TC: No, sir, your Honor, but Judge Garaffa issued a written ruling on the Motion, which I've marked as Appellate Exhibit XII.
>
> MJ: On this particular motion here?
>
> TC: Yes, sir, your Honor.

MJ: All right.

TC: I'm handing it to the bailiff to hand to the military judge.

MJ: This is the motion on command influence?

TC: Yes, sir, your Honor.

MJ: All right. So there's nothing more for this court to do on this particular motion then?

TC: I don't believe so, your Honor.

MJ: Anything further?

IMC: Nothing from the defense, your Honor.

Record at 60. Appellate Exhibit XIII, a Government R.C.M. 304 notice, was then submitted. The IMC stated he had no objection. Record at 61. The court recessed 10 December 2002.

On 11 December 2002 the court came back in session and the military judge said:

> Preliminarily, I want to note for the record that this morning I had a brief 802 with all counsel present. The subject of the 802 was to determine whether it was necessary for me to make a ruling on the motions that were presented into evidence on--as Appellate Exhibits yesterday. And I discussed with counsel the fact that I had had a brief conversation with Captain Garaffa, who had conducted a previous motion session here, and all counsel agree that Captain Garaffa had made the rulings on these motions at that time. All of the motions are—had been ruled on, including the Motion in—in Limine to make certain—that certain receipts would be allowed to be introduced into evidence with written affidavits from a qualified witness in lieu of having a live witness here. . . All these motions, my understanding, and Captain Garaffa has related to me and both counsel have indicated, have been ruled on by the court previously and there being no need for any further ruling at this time. Both counsel concur?
>
> TC: The government does concur, your Honor?
>
> MJ: Defense?
>
> IMC: The defense concurs also, your Honor.

Record at 63.

Notwithstanding the military judge's comment on the record referencing a previous motions session conducted by Judge Garaffa, affidavits from Judge Garaffa, the detailed defense counsel, and the trial counsel state there was no motions session between 30 July 2002 and 10 December 2002. The court reporter notes, affidavits from two court reporters, and numerous emails between parties to this case also support the non-existence of a non-transcribed motions session. Motion to Correct Errata dated 8 Dec 2004. Therefore, we find this record is "substantially verbatim."

In addition, the second military judge not only contacted the previous judge regarding the status of motions, he put their conversation on the record, he held 802 sessions, and prior to his discovery that the motions may have been ruled on, he addressed each appellate exhibit and secured on the record the defense's consent or opposition on each motion. At the 11 December 2002 session, the military judge stated the motions "had been ruled on by the court previously" and both counsel concurred. As previously noted, ultimately defense only opposed one motion and the military judge, via Appellate Exhibit XII, ruled on that motion. The defense posited no objection to the ruling. All the appellate exhibits are sequentially accounted for and are part of the record. The defense counsel was afforded ample opportunity to object to motions and declined to do so.

With regard to the appellant's contention that the record was incomplete due to the absence of AE V, VI, and VIII, and the absence of PE 13, those documents were subsequently provided to the court. Government Motion to Attach of 6 May 2004. Therefore, that portion of the appellant's assigned error is now moot. Considering the record of trial as a whole, we find no prejudice and deny the request for relief.

Post-Trial Delay

In the appellant's second assignment of error he contends he was denied speedy post-trial review. As we consider the record and allied papers, we see no evidence of any complaint to the military judge, staff judge advocate, or convening authority regarding post-trial processing delays. We do specifically note and consider the appellant's 18 November 2003 petition for extraordinary relief in the nature of a writ of mandamus in which he requested this court order additional day-for-day sentence credit for the more than four months of time which elapsed since the promulgating order of 21 July 2003 to whatever day the case is ultimately docketed for appeal. The appellant stated as prejudice the fact the record had not been docketed for appeal, nor had he been appointed an appellate defense counsel. Also, because his case had not been docketed, he asserts he has been denied the opportunity for a hearing before the Naval Clemency and Parole Board. The case was docketed on 1 December 2003; the appellant's Petition for Extraordinary Relief was denied, without prejudice. The appellant's four assignments of error were filed

on 29 March 2004 citing as delay over seven months from trial to convening authority's action and then another four months before docketing for appellate review. The appellant's brief was received without requests for enlargement and the appellant opposed two of the Government's three requests for enlargement. We note that the appellant's case included a mixed plea 340-page record of trial with numerous exhibits and is forwarded with four assignments of error. On 18 October 2004 this court denied the appellant's 14 October 2004 motion to expedite review.

We are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Assuming, without deciding, that the post-trial delay in this case is excessive, we do not find any prejudice or other harm to the appellant resulting from it, nor do we conclude that it affects the "findings and sentence [that] '*should be approved,*' based on all the facts and circumstances reflected in the record." *Id.* (emphasis added). We therefore decline to grant relief.

Sentence Disparity and Appropriateness

In the appellant's third assignment of error, he asserts his sentence is inappropriately severe and disparate to his other co-actors. He requests that we grant sentence relief. We decline to grant relief.

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, 268 (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). 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 States v. Durant*, 55 M.J. 258, 262 (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)).

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). Applying these criteria, we consider the cases of four others who were court-martialed as the result of the closely related larcenies of military property from the same command at approximately the same time. Confinement awarded ranged from no confinement to 5 years. The senior offender, a lieutenant commander, received the most confinement. Other enlisted members court-martialed received confinement of 18 months, 4 months, and no confinement. The appellant, a Sailor with 14 years of service, was, by pay grade, the junior person involved. There was evidence that once confronted by agents, he cooperated extensively in the investigation. He engaged co-actors in incriminating phone conversations that agents were able to record by audio tape. However, before he was caught, the appellant repeatedly over-purchased on government purchase card accounts with the express intent of appropriating for his use and disposal, or the use and disposal of others, thousands of dollars worth of property which deprived other units of the needed equipment or of funding for necessary items. The appellant's misconduct was a significant departure from the trust expected of a seasoned servicemember.

Applying the criteria set forth above, and considering all the circumstances, to include many excellent aspects of the appellant's prior service, we find the appellant's sentence is appropriate and not highly disparate when compared to the companion cases.

Court-Martial Order Mistakes

In his fourth assignment of error, the appellant contends that the court-martial promulgating order, with respect to Specification 2 under Charge I, incorrectly states the appellant was charged with larceny of military property instead of conspiring to steal non-military property, and that as to Specification 3 of Charge I, incorrectly reads larceny where it should read wrongful disposition of military property. We concur.

We test this error under a harmless-error standard and find that it did not affect the appellant's substantial rights, since no prejudice was alleged or is apparent. The appellant is nonetheless entitled to have his official records correctly reflect the results of this proceeding. We therefore direct that the supplemental court-martial order correctly reflect the pleas and findings. *United States. V. Crumpley,* 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Irregular Pleas

Although not raised as error, we note that the trial defense counsel entered pleas to the specifications but not to the charges. Record at 21-22. After conducting a providence inquiry and hearing evidence on the contested charges and specifications,

both of which provided the factual basis for the appellant's guilt, the military judge entered findings to both the charges and all the specifications. Record at 313-14. The military judge should have clarified the pleas before proceeding into the providence inquiry. R.C.M. 910(b). However, this court has previously declined to find prejudice when through a technical oversight the trial defense counsel failed to enter pleas to the specification after entering pleas to the charge. *United States v. Williams,* 47 M.J. 593, 594-95 (N.M.Ct.Crim.App. 1997). We reach a similar conclusion.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed. The supplemental promulgating order will correctly summarize Specifications 2 and 3 under Charge I.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court