UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DARRELL D. BURTON
United States Air Force

ACM 35802 (f rev)

6 December 2006

Sentence adjudged 22 October 2003 by GCM convened at Vandenberg Air Force Base, California. Military Judge: R. Scott Howard (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Andrew S. Williams, Major Sandra K. Whittington, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Steven R. Kaufman.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

PER CURIAM:

This case is before us for further review following completion of new post-trial processing after we modified the findings and reassessed the sentence imposed by the appellant's general court-martial, and returned the record for a new staff judge advocate recommendation and action.[1] In his sole remaining assignment of error, the appellant alleges that his reassessed sentence, consisting of a bad-conduct discharge (BCD), confinement for 6 months, and reduction to the

[1] *United States v. Burton*, ACM 35802 (A.F. Ct. Crim. App. 6 Feb 2006) (unpub. op.).

grade of E-1, is inappropriately severe.[2] The appellant calls to our attention the sentence received by his "co-actor," Staff Sergeant (SSgt) G, which consisted of confinement for 6 months and reduction to E-1, but no BCD.

We consider sentence appropriateness de novo. *United States v. Baker,* 28 M.J. 121, 122 (C.M.A. 1989). Although we generally determine appropriateness without reference to other sentences, we are required to examine sentence disparities in closely related cases, and permitted -- but not required -- to do so in other cases. *United States v. Wacha,* 55 M.J. 266, 267-68 (C.A.A.F. 2001) (citing *United States v. Ballard,* 20 M.J. 282, 286 (C.M.A. 1985)); *United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Olinger,* 12 M.J. 458, 460 (C.M.A. 1982) (citing *United States v. Mamaluy,* 27 C.M.R. 176, 180 (C.M.A. 1959)).

The appellant urges us to treat his case as being "closely related" to that of SSgt G, and argues their sentences are "highly disparate." He contends the government cannot demonstrate a rational basis for the disparity, as required by *Lacy*.[3] The government denies that the cases are closely related and argues the sentences are not highly disparate; but maintains that the facts of the two cases show a rational basis for the difference between the appellant's sentence and that of SSgt G. The parties furnished us with evidence from the record of trial of SSgt G sufficient to permit us to compare his degree of culpability and overall record with that of the appellant.

We agree with the appellant insofar as he claims relation and disparity. The appellant and SSgt G conspired together to take government fire-fighting equipment and sell it via the Internet. While perhaps not co-actors in the most literal sense of the word, their conduct was sufficiently intertwined that we judge them "closely related." Further, all other components of the sentence being equal, we regard the distinction between a BCD in one case and no punitive discharge in the other as significant enough to characterize them as "highly disparate."[4]

We find, however, that there is a rational basis for the distinction between the sentences. The appellant was the more experienced military member, having served some five years longer on active duty than SSgt G. Although the appellant was junior in grade at the time of his trial, the difference was due to the appellant's reduction in grade imposed during nonjudicial punishment proceedings, pursuant

[2] This assignment of error was raised pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).
[3] *Lacy,* 50 M.J. at 288.
[4] A punitive discharge is meant to stigmatize its recipient, with the understanding that the stigma may impose long-term social and economic hardship. *See United States v. Ohrt,* 28 M.J. 301, 306 (C.M.A. 1989) (citations omitted).

to Article 15, UCMJ, 10 U.S.C. § 815, for several unrelated offenses in which SSgt G took no part. Finally, SSgt G had two combat tours in his record that could be considered in mitigation. The appellant, on the other hand, had no combat experience and a civilian criminal conviction. We consider the differences in the records of these two airmen sufficient to account for the disparity between their sentences. *See United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001) (citing *United States v. Taylor*, 991 F.2d 533, 536 (9th Cir. 1993) (the military justice system "must be prepared to accept some disparity" in the sentence of codefendants, provided each is sentenced as an individual). Examining the appellant's conduct in light of his record, we find nothing inappropriately severe in his punishment. *United States v. Peoples*, 29 M.J. 426, 427 (C.M.A. 1990); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

Senior Judge ORR participated in this decision prior to his reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court