UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHARLES S. ROACH
United States Air Force

ACM S31143 (rem)

19 May 2011

Sentence adjudged 20 June 2006 by SPCM convened at MacDill Air Force Base, Florida. Military Judge: Jennifer Whittier (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Dwight H. Sullivan, Esquire (argued), Colonel Nikki A. Hall, Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Major Ryan N. Hoback (argued), Colonel Don M. Christensen, Colonel Douglas P. Cordova, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Major Jefferson E. McBride, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS[1]
Appellate Military Judges

OPINION OF THE COURT

UPON REMAND

This opinion is subject to editorial correction before final release.

[1] Colonel Ronald A. Gregory was designated as Chief Appellate Military Judge for this particular case, pursuant to a memorandum from The Judge Advocate General of the United States Air Force, dated 12 October 2010.

ORR, Senior Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial found him guilty of one specification of willful dereliction of duty for using his government travel card for his own personal expenses on divers occasions and one specification of wrongful use of cocaine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The approved sentence includes a bad-conduct discharge, confinement for 3 months, and reduction to the grade of E-1.[2]

This case is before the Court for further review a second time. In an unpublished decision issued 13 September 2007, this Court affirmed the approved findings and sentence. *United States v. Roach*, ACM S31143 (A.F. Ct. Crim. App. 13 September 2007) (unpub. op.), *rev'd*, 66 M.J. 410 (C.A.A.F. 2008).[3] On 21 November 2007, the Court of Appeals for the Armed Forces returned the case to this Court due to an error in the Court's listing of appellate counsel. *United States v. Roach*, 65 M.J. 445 (C.A.A.F. 2007) (mem.). On 26 June 2008, the Court of Appeals for the Armed Forces found that we erred by deciding the case without the benefit of briefs from the appellant's appointed military appellate counsel. *Roach*, 66 M.J. at 418. As a result, our superior court set aside our decision and returned the case to The Judge Advocate General of the Air Force for remand to this Court "for plenary review with assistance of counsel." *Id*. at 419. The record was thereafter returned to this Court on 21 July 2008. Through briefs filed by his appellate counsel, the appellant subsequently raised eight assignments of error. In response, this Court issued an opinion in April 2009. *United States v Roach*, ACM S31143 (f rev) (A.F. Ct. Crim. App. 24 April 2009) (unpub. op.), *rev'd*, 69 M.J. 17 (C.A.A.F. 2010). On 10 May 2010, our superior court vacated that opinion and remanded the case again to this Court "for a new review under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006), before a new panel." *Roach*, 69 M.J. at 22.

In his new brief, the appellant raises three issues for our consideration: (1) Whether the assistant trial counsel erred by falsely stating on the record that all members of the prosecution had taken the oath required by Article 42(a), UCMJ, 10 U.S.C. § 842(a); (2) Whether the assistant trial counsel erroneously participated in prosecuting the appellant without taking the oath required by Article 42(a), UCMJ; and (3) Whether this Court should exercise its sentence appropriateness powers to set aside the bad-conduct discharge. Finding no prejudicial error, we affirm.

[2] The military judge sentenced the appellant to a bad-conduct discharge, 4 months of confinement, and reduction to E-1. A pretrial agreement limited the maximum period of confinement to no more than 3 months.

[3] After release of the initial decision, the Court issued two corrected versions: one to correct a typographical error and one to correct an error in the listing of names of the appellate defense counsel representing the appellant.

Background

On 13 October 2005, the appellant wrongfully used his government travel card to withdraw money from two automatic teller machines, withdrawing $140.00 the first time and $60.00 the second time. At the time of the withdrawals, the appellant was not on temporary duty orders and the money he withdrew was not for official government travel or related expenses. The appellant knew the two withdrawals were wrongful because the appellant received a written order on 2 August 2005 to use his government travel card only for official travel and related expenses.[4] After the second withdrawal of funds, the appellant gave $40.00 to Ms. JC, a known drug user and prostitute, to buy crack cocaine. He and Ms. JC then smoked the cocaine with Airman First Class (A1C) JN,[5] using a glass tube or "crack pipe" with steel wool stuffed in one end, as a filter.

Required Oath under Article 42(a), UCMJ

The appellant asserts that the assistant trial counsel erroneously participated in prosecuting the appellant without having taken the oath required by Article 42(a), UCMJ. The appellant asks this Court to set aside the sentence and order a rehearing on the sentence. Although we find that the assistant trial counsel's unsworn participation during the trial is error, we find no prejudice to the appellant.

Article 42(a), UCMJ, requires in pertinent part that "[b]efore performing their respective duties . . . trial counsel [and] assistant trial counsel . . . shall take an oath to perform their duties faithfully." At the start of the appellant's trial, the assistant trial counsel stated that all members of the prosecution had been "sworn under Article 42(a)." The staff judge advocate's recommendation to the convening authority acknowledged that the assistant trial counsel had not taken the required oath, but concluded the appellant had not been prejudiced by the error.

Failure to complete the required oath does not constitute a jurisdictional defect or result in "general prejudice" to an accused. *United States v. Walsh*, 47 C.M.R. 926, 930 (C.M.A. 1973). Rather, we must examine the error for prejudice under Article 59(a), UCMJ, 10 U.S.C. § 859(a). *Walsh*, 47 C.M.R. at 930; *United States v. Joslin*, 47 C.M.R. 270, 271 (A.F.C.M.R. 1973); *United States v. Daigneault*, 18 M.J. 503, 505-06 (A.F.C.M.R. 1984). In the case sub judice, the assistant trial counsel played a substantial role in the appellant's prosecution at trial. He offered all of the Government's evidence during the sentencing hearing. Additionally, he cross-examined the appellant's wife and gave the opening and rebuttal sentencing arguments. Nothing in the record indicates the

[4] The appellant's wrongful use of his government travel card served as the basis for the willful dereliction of duty charge.

[5] Airman First Class (A1C) JN was separately tried by special court-martial and, on 1 June 2006, was convicted of one specification of dereliction of duty for underage drinking and one specification of wrongful use of cocaine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a.

assistant trial counsel intentionally misled the military judge or failed to perform his duties faithfully as required by Article 42(a), UCMJ. After reviewing the record of trial, we found no prejudice to this appellant, general or otherwise. Therefore, we hold that the appellant's first and second asserted errors are without merit.

Sentence Appropriateness

Next, the appellant asks this Court to exercise its sentence appropriateness powers to set aside the bad-conduct discharge adjudged and approved in his case. The appellant asserts that the approved sentence is inappropriately severe for two reasons. First, he argues that, because the assistant trial counsel was not sworn, his actions threatened the armed forces' reputation for attention to detail and efficiency, and the public's confidence in the military can only be restored by setting aside the appellant's bad-conduct discharge. Second, the appellant contends that there is a substantial disparity between the sentence he received and the sentence of his co-actor, A1C JN. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010); *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In making a sentence appropriateness determination, we are required to examine sentences 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). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. An appellant bears the burden of demonstrating that any cited cases are "closely related" to his case and that the sentences are "highly disparate." *Id.* If both factors exist, the question becomes whether there is a rational basis for the difference in the respective sentences. *Id.*; *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001).

We are convinced that A1C JN and the appellant were co-actors, for sentence comparison purposes. Both were charged with wrongful use of cocaine, arising out of the same transaction. Additionally, they were charged with other offenses that were committed individually during the same evening, while the two were together.

When comparing sentences of co-actors to determine if they are highly disparate, we look to the sentences adjudged, not approved. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). While this Court may consider approved sentences when "exercising its power over sentence appropriateness generally," our superior court noted that this is in contrast to the standard for required, direct comparison of disparate sentences in closely related cases, wherein "adjudged sentences are used because there are several intervening and independent factors between trial and appeal." *Roach*, 69 M.J. at 21. A1C JN was sentenced by a panel of officers to 30 days of confinement, 90 days of hard labor without confinement, forfeiture of $325.00 pay per month for 6 months, reduction to E-1, and a reprimand. Comparing this to the appellant's adjudged sentence of a bad-conduct discharge, 4 months of confinement, and reduction to E-1, the only significant difference is the appellant's receipt of a punitive discharge.[6] While A1C JN's adjudged sentence included only 30 days of confinement in comparison to 4 months for the appellant, that difference is offset by the additional punishments of hard labor without confinement and forfeitures, neither of which applied to the appellant. We consider these portions of the sentence as comparable. Conversely, because the appellant received a bad-conduct discharge, when A1C JN did not, we consider the sentences to be "highly disparate." *See United States v. Brown*, 32 C.M.R. 333, 336 (C.M.A. 1980) ("Considering the consequences of a bad-conduct discharge, we entertain no doubt that confinement at hard labor for six months and forfeiture of pay for a like period is a less severe penalty . . . .").

Having found the appellant's and A1C JN's sentences "highly disparate," we must determine whether there is a rational basis for the disparity. After reviewing the record of trial, we believe that a rational basis for the disparity exsists. First, according to the stipulation of fact, the appellant was the one who made the arrangements for the illegal drug activity. Even though they were both found guilty of a dereliction of duty, the underlying misconduct was different. The basis for A1C JN's dereliction of duty conviction was underage drinking, while the appellant was found guilty of willfully misusing his government travel card on two occasions to withdraw cash for his personal use, unrelated to any approved government travel. Further, he did so after recently receiving a written order telling him that he could only use the card for official travel or related expenses. Moreover, the appellant outranked A1C JN. Although there is not much difference in rank between a Senior Airman and an A1C, there is nonetheless a difference. The Air Force places greater responsibility on Airmen as they progress to higher rank and expects them to set the example for those junior in rank. *See* Air Force Instruction (AFI) 36-2618, *The Enlisted Force Structure*, ¶ 3.2 (27 February 2009).

Finally, the military judge was well aware that A1C JN's sentence did not include a bad-conduct discharge because the appellant included the terms of A1C JN's sentence

[6] The convening authority reduced A1C JN's sentence to 30 days confinement, 35 days hard labor without confinement, forfeiture of $325 pay per month for 2 months, reduction to E-1 and a reprimand.

in his written unsworn statement. In response to an objection by the assistant trial counsel, the military judge admitted the appellant's written unsworn statement into evidence and told the parties that she understood how to properly assess the information placed before her. "As the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary." *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008). We are confident that she properly considered the evidence and had a rational basis for the differences in the two sentences.

We find no merit in the appellant's assertion that the disparity in the two sentences would present a threat to the military justice system's reputation for fairness and integrity. We have also considered, but find no merit in, the unresolved, asserted issues in the appellant's original submissions. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

Conclusion

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court