UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ALLAN P. JAMES
United States Air Force

ACM 34863

10 December 2003

Sentence adjudged 14 September 2001 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Thomas W. Pittman.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Maria A. Fried, Major Jefferson B. Brown, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Nurit Anderson.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification each of divers use and distribution of ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A general court-martial consisting of officer members sentenced him to a dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant submitted three assignments of error: (1) That the appellant's dishonorable discharge is inappropriately severe; (2) That the military judge erred in granting the prosecution's challenge for cause against a court member; and (3) That the military judge erred in limiting defense cross-examination of a prosecution witness concerning the terms

of the witness's pretrial agreement (PTA). Finding no error prejudicial to the appellant's substantial rights, we affirm.

I. Sentence Appropriateness

The appellant was assigned to the 52d Supply Squadron at Spangdahlem Air Base, Germany. On divers occasions between 12 June 2000 and 20 May 2001, the appellant used ecstasy. On divers occasions between 19 July 2000 and 11 May 2001, he distributed ecstasy. These acts were often done in the presence of other airmen, including Airman (Amn) Rose, Amn Thompson, and Airman Basic (AB) Jordan. The evidence adduced at trial established that the appellant used ecstasy with these airmen and also distributed ecstasy to them. These other airmen were also court-martialed for drug abuse.

The appellant argues that his sentence of a dishonorable discharge is inappropriately severe when considering the punishments imposed in the cases of Amn Rose, Amn Thompson, and AB Jordan. Amn Rose was convicted by a general court-martial of attempting to import ecstasy into the United Kingdom, divers use and distribution of ecstasy, possession of ecstasy with intent to distribute, and wrongful use of marijuana, during the time period between 1 November 2000 and 22 May 2001. The military judge sentenced him to a bad-conduct discharge, confinement for 18 months, and reduction to E-1. The convening authority reduced the amount of confinement to 16 months and 20 days. Amn Thompson was convicted by a special court-martial of use and distribution of psilocybin mushrooms, divers use and distribution of ecstasy, and use of marijuana during the time period between 1 February 2000 and 21 August 2000. The military judge sentenced Amn Thompson to a bad-conduct discharge, forfeiture of $695.00 pay per month for 5 months, confinement for 5 months, and reduction to E-1. AB Jordan was convicted by a special court-martial of possession of ecstasy and divers use and distribution of ecstasy between 22 July 2000 and 17 August 2000. The military judge sentenced him to a bad-conduct discharge and confinement for 5 months. The appellant asserts his sentence to a dishonorable discharge is inappropriately severe when compared to the sentences of these three airmen.

Sentence appropriateness is determined by examining the nature of the offense and "the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). It "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). Sentence comparison is just one aspect of sentence appropriateness. *Snelling*, 14 M.J. at 268. Although this Court exercises broad discretion in determining sentence appropriateness, our superior court has outlined guidance on determining when, as a matter of law, sentence appropriateness is at issue:

> (1) whether the cases are "closely related" (*e.g.*, 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); (2) whether the cases resulted in "highly disparate" sentences; and (3) if the requested relief is not granted in a closely related case involving a highly disparate sentence, whether there is a rational basis for the differences between or among the cases.

United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999). Even if these criteria are not satisfied, we may consider sentence comparison in the exercise of our broad discretion to consider and compare other courts-martial sentences when reviewing a case for sentence appropriateness. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). The only sentence disparity urged upon us by the appellant is that of the punitive discharge, and we will review the *Lacy* criteria within this context.

A. Whether the cases are closely related.

We note that all four cases include specifications of use and distribution of ecstasy. However, the time periods alleged among the four cases are not identical. While there is some overlap among these charges, the significant differences among the times alleged necessitate the proof of substantially different facts from case to case. In addition, two of the other airmen were charged with use and distribution of other drugs in addition to ecstasy. These members were not co-actors nor were they engaged in common or parallel schemes. Any nexus among these cases is indirect and minor by comparison to those areas in which they are separate and distinct. Therefore, we conclude that these cases are not closely related for purposes of sentence comparison.

B. Whether the sentences are highly disparate.

Even if the cases are closely related, however, we do not hold that the sentences are highly disparate. Admittedly, the severity of punitive discharges is harder to quantify than length of confinement. A dishonorable discharge "should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment . . . ." Rule for Courts-Martial (R.C.M.) 1003(b)(8)(B). On the other hand, a bad-conduct discharge "is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses . . . ." R.C.M. 1003(b)(8)(C). Our superior court has stated that the distinction between these two discharges is "longstanding" and that "in history, practice and law, a dishonorable discharge is more severe than a bad-conduct discharge." *United States v. Mitchell*, 58 M.J. 446, 448 (C.A.A.F. 2003). Insofar as a punitive discharge of either type entails an ongoing measure of public disgrace, such disgrace is perforce greater for a dishonorable discharge.

Whether the appellant's sentence is highly disparate from the other airmen is another matter. Under Article 66, UCMJ, 10 U.S.C. § 866, our charter is to ensure relative uniformity among sentences, not arithmetical equivalence. Indeed, this court has previously held that the disparity was not high between two cases distinguishable only by one having received a punitive discharge while the other did not. Even when cases are similar, it is not unusual for one defendant to be sentenced to a punitive discharge while another defendant is not. *See United States v. Hranac*, ACM S30025 (A.F. Ct. Crim. App. 9 Dec 2002) (unpub. op.). By comparison, the disparity between a dishonorable discharge and a bad conduct discharge is even less. Therefore, we conclude that the sentences are not highly disparate.

C. Whether there is a rational basis for the disparity.

Given our conclusion that the cases are not closely related nor the sentences highly disparate, we have no need to consider whether there is a rational basis for the disparity. We would note, however, that the appellant's case is the only one of the four decided by members. Difference in forum can be a rational explanation for sentence disparities. *See United States v. Durant*, 55 M.J. 258, 263 (C.A.A.F. 2001) (Sullivan, J., concurring).

D. Conclusion

Based on the above, we conclude that we are not required to consider sentence comparison in assessing the appropriateness of the appellant's sentence. Although we note the results of the other cases, the evidence admitted at trial establishes that the appellant sought to profit from the distribution of ecstasy, that he urged the drug upon other members who had expressed no apparent interest in it, and that his misconduct occurred repeatedly over the course of nearly a year. In addition, his record includes a letter of reprimand, a referral enlisted performance report, and a prior civilian conviction for theft. Taking into account the entire record, the character of the appellant, and the nature of the charges, we conclude that the sentence is appropriate.

II. Challenge for Cause

During voir dire, one of the prospective members, Major W, was questioned as to her views on punishment in drug cases by the circuit trial counsel:

> Q. Major [W] in response to one of my questions regarding progressive discipline, you said that you didn't feel that a court-martial may be the appropriate starting point for someone who has admitted guilty [sic] to use and illegal distribution of drugs. Could you please expound on your answers as to why you feel that way?

A. I truly feel, looking at the individual, it almost feels like it is a one shot deal. You have one shot at making a mistake and then that's it. Of course, everyone has seen the Air Force Times showing the big drug bust in the Virginia area and all the airmen and airman basics, senior airman [sic], and what sentences they have received . . . and it was kind of shocking to me.

The military judge then questioned Major W:

Q. And just let me ask you, do you feel comfortable sitting on this case?

A. No, I don't.

Q. Any why is that?

A. Just because, again, I have read—you just see in the paper all the time and the punishments that the kids got, the young airmen got in Virginia—we have no tolerance of drugs whatsoever in the military, which we know that. Yet on the other hand, I just feel that a young person shouldn't be probably kicked out and put in jail or whatever.

. . . .

Q. I don't read the Air Force Times, so I don't know what articles you are talking about.

A. Actually there was a big drug bust in Virginia . . . I saw all their sentences and I was shocked, I was taken back.

Q. At what?

A. Their sentences . . . I just thought, wow, these guys made a mistake and look at the punishment for this . . . .

Although Major W stated she could perform her duties as a court member and be fair to both sides, the military judge granted a prosecution request to challenge her for cause. In explaining his rationale, the military judge stated:

Well, my recollection is that she not only said she was shocked twice by a punitive discharge, but shocked by another form of punishment as well, that may have been confinement. She also said that. [sic] "She hated or hates to see the airmen kicked out for this offense" were the words I recall her using in reference to those discharges. She seemed almost relieved when I asked if she would be uncomfortable sitting on the court, as though

> it was going to be an opportunity for her not to have to sit on the court . . . It just seems to the court, from viewing her and viewing her expressions as she described the Air Force Times article in regard to these other cases, that she would have an extremely difficult time in sitting on this case and doing just what she promised to do, which was consider the entire range of punishments . . . .

Each party to a court-martial is entitled to make challenges for cause. R.C.M. 912(f)(2)(A); *United States v. Barrow*, 42 M.J. 655, 660 (A.F. Ct. Crim. App. 1995) *aff'd*, 45 M.J. 478 (C.A.A.F. 1997). The military judge is "enjoined to be liberal in granting challenges for cause." *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003); *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000); *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998).

Appellate courts "review a military judge's ruling on a challenge for cause for abuse of discretion." *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997); *Downing*, 56 M.J. at 422; *Armstrong*, 54 M.J. at 53. However, implied bias is reviewed less deferentially. *Napoleon*, 46 M.J. at 283. The military judge's rulings on challenges for cause must ensure that an accused receives both his due process and regulatory right to a fair and impartial panel. *Downing*, 56 M.J. at 421.

In the case sub judice we hold that the military judge did not abuse his discretion in granting the challenge for cause against Major W. Throughout voir dire, she expressed genuine concern over perceived injustice in confining and/or discharging a member for drug use and stated that she would not be comfortable sitting on the case. The military judge's assessment of her demeanor and the tenor of her responses to voir dire questions viewed as a whole establish a rational basis for granting the challenge.

Of course, a challenge granted in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), would constitute unlawful discrimination and would, therefore, be erroneous. However, the record provides no reason to conclude that that is the case with the challenge against Major W. It should also be noted that the military judge denied another prosecution challenge for cause and granted two such challenges requested by the defense. Therefore, the military judge did not deny the appellant his right to a fair and impartial panel when he granted the prosecution challenge for cause against Major W.

III. Other Issues

We resolve the remaining assignment of error adversely to the appellant. The military judge did not abuse his discretion by limiting cross-examination. *United States v. Shaffer*, 46 M.J. 94 (C.A.A.F. 1997).

Although not raised as an assignment of error, we note that General Court-Martial Order No. 5, 6 December 2001, Headquarters Third Air Force (USAFE), is incorrect. We will order corrective action in our decretal paragraph.

IV. Conclusion

The 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). A corrected court-martial order shall be prepared to reflect the forfeiture of all pay and allowances that the members adjudged as part of the appellant's sentence. This case does not need to be returned to this Court. Accordingly, the findings and sentence are

AFFIRMED.

BRESLIN, Senior Judge (concurring in result):

I concur in the lead opinion. I write separately only to note a more fundamental reason why the appellant's allegation of error regarding the challenge for cause of Major W is without merit.

As noted above, the military judge granted the challenge for cause, therefore Major W did not sit on the court-martial. There was no issue under *Batson v. Kentucky*, 476 U.S. 79 (1986) or its progeny, which prohibit the use of peremptory challenges to exclude persons from a jury for an unlawful purpose. I fail to see how the appellant's right to a fair trial could be prejudiced by the absence of a specific court member due to a challenge for cause. The appellant has no right to have a specific court member sit on his case. Even if the military judge erred in granting a challenge for cause, to establish prejudice the appellant would have to demonstrate that the remaining members were not fair and impartial. Thus, the real issue would be any challenge to the array or challenge for cause against the remaining members that was not granted.

For this reason, I would reject the assignment of error. To the extent that the opinion suggests that a military judge's decision to grant a challenge for cause is tested merely for error without regard to actual prejudice, I disagree.

OFFICIAL

HEATHER D. LABE
Clerk of Court