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U.S. Navy–Marine Corps Court of Criminal Appeals.

UNITED STATES of America
v.
Bruce A. PENN, Jr. Lance Coroporal (E–3), U.S. Marine Corps.

NMCCA 200401065.
Sentence Adjudged: 25 July 2003.
30 Sept. 2008.

General Court–Martial.
Military Judge: Maj M.J. Griffith, USMC.

Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col D.M. Wunder, USMC.

For Appellant: Gary Myers; LT James Golladay, JAGC, USN; Capt Sridhar Kaza, USMC.

For Appellee: Maj Wilbur Lee, USMC; LT Timothy Delgado, JAGC, USN.

Before R.E. VINCENT, E.C. PRICE, J.E. STOLASZ, Appellate Military Judges.

OPINION OF THE COURT

VINCENT, Senior Judge.

***1** A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of conspiracy to wrongfully introduce and distribute marijuana, one specification of wrongful introduction of marijuana, and three specifications of wrongful distribution of marijuana, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. § 881 and 912a. The appellant was sentenced to confinement for 8 years, forfeiture of all pay and allowances, reduction to pay grade E–1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant raises two assignments of error. First, he alleges ineffective assistance of counsel based on the assertions that his trial defense counsel advised him to waive an Article 32, UCMJ, pretrial investigative hearing (Article 32) and failed to investigate potential defense witnesses. Second, he contends the military judge erred by demonstrating no rational basis for the highly disparate sentence of Private First Class (PFC) Prince Nellon, USMC, in his closely related case, and by admitting the testimony of PFC Nellon when it was obtained from an illegal search. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant's conviction of Charge I (conspiracy to introduce and distribute marijuana) and Specifications 1 and 2 of Charge II (wrongful introduction of 11 pounds of marijuana onboard Camp Lejeune between 1 February and 19 September 2002 and wrongful distribution of marijuana between 1 February and 15 August 2002) were based primarily on the testimony of PFC Nellon, his co-conspirator. The appellant's conviction of Specifications 3 and 4 of Charge II (wrongful distribution of marijuana on 19 August 2002 and 28 August 2002, respectively) were based on the testimony of an undercover Naval Criminal Investigative Service agent and a government cooperating witness.

I. Ineffective Assistance of Counsel

A. Procedural History

In support of his allegation that his trial defense counsel were ineffective, the appellant submitted a declaration to the court. On 5 October 2006, we ordered the Government to secure affidavits from the appellant's trial defense counsel, Captain (Capt) Peter Houtz, USMC, and 1st Lieutenant (1stLt) John Reh, USMC, in response to the appellant's allegations of ineffective assistance of counsel. Their responses, when considered in light of the record of trial, were insufficient for this court to adequately address the ineffective assistance of counsel issue. Therefore, on 3 July 2007, we returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority to either order a hearing pursuant to *United States v. DuBay,* 37 C.M.R. 411 (C.M.A.1968), or order a rehearing on findings and sentence.[1]

***2** A *DuBay* hearing was conducted on 19, 22 and 26 October 2007. The military judge who presided over

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the hearing issued written essential findings of fact and conclusions of law on 30 November 2007. Appellate Exhibit LXIII. After considering the evidence adduced at the *DuBay* hearing, the military judge concluded that the appellant's trial defense counsel were not ineffective. *Id.* at 13.

B. The Law

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington,* 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel were deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.; United States v. Dewrell,* 55 M.J. 131, 133 (C.A.A.F.2001). The appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *United States v. Quick,* 59 M.J. 383, 387 (C.A.A.F.2004). The appellant " 'must surmount a very high hurdle.' " *United States v. Smith,* 48 M.J. 136, 137 (C.A.A.F.1998)(quoting *United States v. Moulton,* 47 M.J. 227, 229 (C.A.A.F.1997)).

The effectiveness of counsel is a mixed question of law and fact. *United States v. Anderson,* 55 M.J. 198, 201 (C.A.A.F.2001). The factual findings of the military judge are reviewed under a clearly erroneous standard, and the ultimate determinations whether the representation was ineffective and, if so, whether it was prejudicial, are reviewed *de novo. Id.; see United States v. Cain,* 59 M.J. 285, 294 (C.A.A.F.2004).

Reviewing the military judge's essential findings of fact under a clearly erroneous standard, we conclude that they are supported by the record and we adopt them as our own. We must now consider *de novo* whether these facts support a finding that the appellant's trial defense counsel were not ineffective.

C. Analysis

1. Waiver of Article 32, UCMJ

The first four determinations made by the military judge pertain to the appellant's 18 March 2003 unconditional waiver of his Article 32. We note that Capt Houtz was detailed as the appellant's trial defense counsel in January 2003. 1stLt Reh was detailed as the appellant's individual military counsel in May 2003, after the appellant waived his Article 32.

At the *DuBay* hearing, Capt Houtz testified that he used the Article 32 Investigating Officer's guide book to explain the appellant's Article 32 rights, as well as the general purposes of an Article 32 investigation. He stated the appellant understood his rights and the purpose of the Article 32 hearing. Record at 436–37, 449–55, and 462, *see* AE LXIII at 4.

***3** The appellant testified he did not understand his rights or the general purpose of an Article 32 hearing because Capt Houtz did not provide this information to him. However, as the military judge noted in his findings of fact, which we have previously adopted as our own, the appellant expressly acknowledged he understood the following facts concerning an Article 32, hearing: (1) the right to present evidence; (2) Captain Houtz would represent him; and, (3) the Government would present evidence and participate in the process. AE LXIII at 8; *see also,* Record at 522–23, 537–38. We agree with the military judge's legal conclusion that Capt Houtz' testimony, the language contained in the Article 32 waiver form signed by the appellant (AE XXIII), and the appellant's admissions are "strong evidence the appellant knew the general purposes of the hearing." AE LXIII at 8. Additionally, based on Capt Houtz' testimony and the appellant's admissions, we are convinced that, prior to waiving his right to an Article 32 hearing, Capt Houtz explained the general purposes of the hearing to the appellant. Record at 436–37, 449–55, 462, 522–23, 538.

Regarding the appellant's waiver of his Article 32 hearing, we find that Capt Houtz advised the appellant to waive his Article 32 hearing and the appellant, based on advice of counsel, knowingly and voluntarily waived the hearing. AE LXIII at 4, 8; *see also* Record at 444–45, 462, 539–40, and 542.

2. Trial defense counsel's attempts to locate and contact three potential exculpatory witnesses

The military judge's fifth determination addressed the appellant's allegation that his trial defense counsel failed to locate and contact three potential exculpatory witnesses—Cindy Spratling, Octavious Holstick, and Travis Turner.

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At the *DuBay* hearing, LtCol Robert Fifer, USMC, the trial counsel for appellant's general court-martial, testified that he and the Naval Criminal Investigative Service (NCIS) coordinated efforts with Alabama and Virginia law enforcement authorities in an unsuccessful attempt to locate these three witnesses. He further testified the Government could have potentially used these witnesses for both PFC Nellon's and the appellant's general courts-martial. Record at 351–53; AE LXIII at 1–2. He also noted the appellant's counsel frequently asked him if the Government had located these witnesses and expressed frustration concerning the Government's inability to locate them. *Id.* at 359, 377.

Capt Houtz testified he requested the Government to provide assistance from NCIS in locating the three witnesses. He and 1stLt Reh also coordinated efforts with PFC Nellon's attorneys to locate the witnesses, including contacting local law enforcement authorities in Alabama and Virginia, reviewing PFC Nellon's cell phone records, conducting internet searches, and requesting the appellant to provide contact information for Travis Turner. *Id.* at 431–35, 452–53, 456–59; AE LXIII at 5–6, 9–10. 1stLt Reh also testified that the defense team attempted to locate these witnesses and requested the appellant's assistance in locating Travis Turner. *Id.* at 398–99. Capt Houtz explained he and the appellant ultimately decided it was in the appellant's best interest not to locate these witnesses based on their criminal records and their potential ability to corroborate PFC Nellon's testimony against the appellant. *Id.* at 434–35, 459.

***4** We find that the appellant's trial defense counsel undertook diligent and reasonable steps in attempting to locate and contact the three potential witnesses.[2] AE LXIII at 1–2, 6, 10–11. Additionally, we find that Capt Houtz's advice to the appellant not to file a motion to produce these three witnesses was a valid tactical decision, since he was unable to interview them and ascertain whether their testimony would aid or hinder the appellant's defense. AE LXIII at 10.

3. Trial defense counsel's attempts to locate and contact potential alibi witnesses

The military judge's final determination addressed whether the appellant informed his trial defense counsel of specific individuals who could verify that he was on official field exercises and operations on the dates on which he was convicted of purchasing illegal drugs.

At the *DuBay* hearing, both Capt Houtz and 1stLt Reh denied that the appellant provided them the names of potential alibi witnesses from his command. Record at 397, 405, 439–40. However, the appellant testified that he provided the names of co-workers to his defense counsel. *Id.* at 503–04, 513, 526, 545. The appellant did not specifically indicate that his co-workers were potential alibi witnesses.

Capt Houtz testified that he had numerous discussions with the appellant's work supervisor, a staff noncommissioned officer-in-charge (NCOIC), concerning the appellant's shift work schedule at a chow hall and his participation in field exercises during the times of the offenses. *Id.* at 440–41, 460. He noted that, based on these discussions, the appellant had an opportunity to travel to Alabama and Virginia during the time frame of the offenses. *Id.* at 440–41. Accordingly, the defense did not attempt to interview the appellant's co-workers, most of whom had deployed to Iraq, since the discussions with the NCOIC indicated the appellant did not have an alibi defense. *Id.*

We agree with the military judge's findings of fact and legal conclusion that the appellant provided his defense counsel the names of co-workers, but did not indicate that they were alibi witnesses. AE LXIII at 2, 5, 12. We also agree with the military judge's legal conclusion that the appellant's trial defense counsel reasonably relied on the information provided by the NCOIC concerning the appellant's field exercise and shift schedules. *Id.* at 13. Finally, we agree with the military judge's legal conclusion that the appellant's work schedule did not prevent him from traveling to Alabama and Virginia during the time of the offenses. *Id.* at 12.

(4) Conclusion

We have thoroughly considered the appellant's extensive arguments on each of these issues and conclude that the appellant was not denied effective representation under the applicable standards of review. Accordingly, we find the appellant's claim that he was denied effective assistance of counsel to be without merit.

II. Sentence Disparity and Military Judge Erred by Denying the Appellant's Motion to Suppress Derivative Evidence

***5** The appellant's second assignment of error contains two distinct allegations of error. We will consider each allegation separately.

A. Sentence Disparity.

In the first portion of the second assignment of error, the appellant contends that the approved sentence in his case is highly disparate in comparison with the approved sentence of his co-conspirator, PFC Prince Nellon. In support of his contention, the appellant notes PFC Nellon was sentenced at a general court-martial to a period of confinement of 42 months while the appellant was confined for 8 years. For purposes of our analysis, we also note PFC Nellon received a bad-conduct discharge while the appellant received a dishonorable discharge.

This case requires us to exercise our unique, highly discretionary authority under Article 66, UCMJ, to determine sentence appropriateness. *See United States v. Baier,* 60 M.J. 382, 384 (C.A.A.F.2005). This analysis "includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen,* 54 M.J. 294, 296 (C.A.A.F.2001)(citing *United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F.1999)). We are not required to "engage in sentence comparison with specific cases 'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.' " *Lacy,* 50 M.J. at 288 (quoting *United States v. Ballard,* 20 M.J. 282, 83 (C.M.A.1985)). When we compare sentences of co-conspirators, we initially determine if the cases are closely related; if so, we then determine if the sentences are highly disparate. The appellant bears the burden of demonstrating that the cases are closely related and highly disparate. *Id.* at 288. If the appellant meets this burden, the burden then shifts to the Government to show a rational basis for the differences. *Sothen,* 54 M.J. at 296; *Lacy,* 50 M.J. at 288.

The appellant has met the first burden that the two cases are closely related, since he and PFC Nellon were co-conspirators involved in a common crime. We next consider whether the appellant has met his burden of demonstrating that the sentences are highly disparate.

In our opinion, the appellant failed to meet his second burden of demonstrating that his sentence and PFC Nellon's sentence are "highly disparate". The appellant was convicted of conspiracy to wrongfully introduce and distribute marijuana, wrongful introduction of 11 pounds of marijuana onboard Camp Lejeune, and three specifications of wrongful distribution of marijuana. In contrast, PFC Nellon was convicted of conspiracy to wrongfully possess, distribute and introduce marijuana, wrongful use of marijuana, and wrongful introduction of some amount of marijuana onboard Camp Lejeune.

Considering the vast difference between the amount of marijuana the appellant introduced onboard a military installation, 11 pounds, as compared to PFC Nellon, "some amount", and further considering the appellant distributed marijuana onboard a military installation on three occasions, their respective sentences fall within an acceptable range "of what one would expect different general courts-martial, in carrying out their obligation to determine an appropriate sentence based on an evaluation of the offense(s) and the offender," to reach. *United States v. Fee,* No. 97 00382, unpublished op. at 2 (N.M.Ct.Crim.App. 8 Dec 1997), *aff'd,* 50 M.J. 290 (C.A.A.F.1999). Accordingly, we find that the respective sentences are relatively uniform considering the respective offenses.

***6** Additionally, the test for determining whether sentences are highly disparate "is not limited to a narrow comparison of the relative numerical values of the sentences at issue, but may also include consideration of the disparity in relation to the potential maximum sentence." *Lacy,* 50 M.J. at 289. In the instant case, the appellant was facing a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, 75 years confinement and reduction to pay grade E–1. Since he was sentenced to a confinement period less than one-ninth of the maximum allowable, we conclude that there is a much greater disparity between the appellant's sentence and the potential maximum punishment as compared to the disparity between his sentence and PFC Nellon's sentence. *Id.*

However, even if the appellant had satisfied his burden of demonstrating that the two sentences are highly disparate, we believe that the Government has demonstrated a rational basis for the disparity. *Id.* at 288. First, we again note that the appellant was convicted of wrongfully introducing 11 pounds of marijuana and wrongful distribution of marijuana on three occasions. Second, the appellant was the more senior Marine.

We also recognize our duties under Article 66(c), UCMJ, to ensure uniformity, even-handedness, and a fair and just punishment for every accused. *United States v. Durant,* 55 M.J. 258, 263 (C.A.A.F.2001). Nevertheless, our superior court indicated that "the military system must be prepared to accept some disparity in sentencing of co-defendants, provided each military accused is sentenced as an individual." *Id.* at 261.

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We have considered the close relationship between these two cases and conclude that a sentence adjustment is not required. The appellant's sentence, including 8 years confinement and a dishonorable discharge, is appropriate given the offenses of which he was convicted.

B. Military Judge Erred by Denying the Appellant's Motion to Suppress Derivative Evidence

In the second portion of his second assignment of error, the appellant contends the military judge erred by denying his pretrial motion to suppress the testimony of PFC Nellon as derivative of an unlawful seizure. On 19 September 2002, PFC Nellon was operating the appellant's motor vehicle, while the appellant was a passenger. As the vehicle entered the front gate at Camp Lejeune, military police suspected that PFC Nellon was operating a motor vehicle while intoxicated. However, the military police mistakenly directed the vehicle to the "random search" lane. Consequently, military police conducted a search and found marijuana inside the vehicle. Pursuant to the appellant's pretrial motion, the military judge suppressed the marijuana as a result of an unlawful search and seizure. See AE X; Record at 47–48.

After the trial judge's ruling, the appellant's trial defense counsel filed a pretrial motion to suppress the testimony of PFC Nellon as derivative evidence of the unlawful seizure. In denying the motion to suppress, the military judge made the following findings of fact: (1) PFC Nellon waived his right to remain silent and voluntarily chose to provide a statement to military police; (2) law enforcement officers noticed the appellant's and PFC Nellon's name on the military police blotter entry for 19 September 2002 and provided PFC Nellon's name to NCIS agents, who were already investigating the appellant for suspected drug distribution; and, (3) it was distinctly possible both the appellant's and PFC Nellon's name would have still appeared on the military police blotter since PFC Nellon was suspected of operating the appellant's vehicle while intoxicated. *See* AE XVI; Record at 96–97.

***7** Based on his findings of fact, the military judge concluded the original taint of the illegal action was sufficiently attenuated by passage of time, intervening circumstances, and PFC Nellon's free will in choosing to speak. AE XVI at 2. In his ruling, he noted the NCIS agents who questioned PFC Nellon were unaware of the impropriety of the search at the time of the interviews and provided cleansing warnings to PFC Nellon before he made incriminating statements. *Id.*

A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion. His ruling will not be overturned on appeal " 'absent a clear abuse of discretion.' " *United States v. Johnson,* 46 M.J. 8, 10 (C.A.A.F.1977)(quoting *United States v. Redmond,* 21 M.J. 319, 326 (C.M.A.1986)). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney,* 54 M.J. 120, 130 (C.A.A.F 2000). A military judge's ruling on admissibility of evidence will only be overturned if it is "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller* 46 M.J. 63, 65 (C.A.A.F 1997)(quoting *United States v. Travers,* 25 M.J. 61, 62 (C.M.A.1987)). In conducting our review, we are required to consider the evidence "in the light most favorable" to the "prevailing party." *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F 1996).

We have reviewed the record of trial and concur with the military judge's legal determination that original taint of the illegal action was sufficiently attenuated by the passage of time, intervening circumstances, and PFC Nellon's choice to speak to law enforcement authorities about his and the appellant's criminal activities. Accordingly, we hold that the military judge did not abuse his discretion in denying the appellant's suppression motion.

Concluusion

The findings and sentence are affirmed.

Judge PRICE and Judge STOLASZ concur.

Footnotes

1 In our 3 July 2007 order, we indicated that if a *DuBay* hearing was conducted, the military judge was directed to make the following determinations: (1) whether trial defense counsel explained the purpose of an Article 32, UCMJ, hearing to the appellant prior to his waiving the hearing?; (2) whether the appellant understood the purpose of an Article 32, UCMJ, hearing prior to waiving the hearing?; (3) whether the appellant knowingly and voluntarily waived his Article 32, UCMJ, hearing?; (4) whether trial defense counsel recommended to the appellant that he waive his Article 32, UCMJ hearing?;

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(5) what specific attempts trial defense counsel made to locate and contact, prior to trial, Cindy Spratling, Octavious Holstick, and Travis Turner?; and, (6) whether the appellant informed his trial defense counsel of specific individuals who could verify that he was on official field exercises and operations on the dates on which he was convicted of purchasing illegal drugs?

2 The military judge also noted the Government's inability to locate these witnesses prior to the *DuBay* hearing.

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