

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20230534

v.

Private (E-1)
ZACKERY M. ARMSBURY,
United States Army

Appellant

Tried at Fort Bliss, Texas, on 8 April and
10 October 2023, before a general court-
martial appointed by the Commander,
Headquarters, First Armored Division,
Lieutenant Colonel Clay West and
Colonel Javier E. Rivera-Rosario, Military
Judges, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS**

Assignment of Error

**WHETHER APPELLANT’S SENTENCE AND THE SENTENCE
IN THE COMPANION CASE OF SGT [REDACTED] ARE
INAPPROPRIATELY DISPARATE, RENDERING
APPELLANT’S SENTENCE INAPPROPRIATELY SEVERE AS
A MATTER OF LAW.**

Statement of the Case

On 10 October 2023, a military judge, sitting as a general court-martial
convicted appellant, pursuant to his plea, of assault consummated by battery, in
violation of Article 128, Uniform Code of Military Justice [hereinafter UCMJ], 10
U.S.C. § 928 (2019). (R. at 26, STR).¹ Consistent with the plea agreement, the

¹ The military judge granted the government’s motion to dismiss, without prejudice
to ripen into prejudice upon completion of appellate review, the excepted language

military judge sentenced appellant to be confined for 60 days and to be discharged from the service with a bad-conduct discharge. (R. at 151). The convening authority approved the findings and sentence as adjudged. (Action).

Statement of Facts

Appellant, SGT [REDACTED] PFC [REDACTED] SGT [REDACTED], PFC [REDACTED], and SPC [REDACTED], members of C Company, 2nd Battalion, 37th Armored Regiment, 1st Armored Brigade Combat Team, were drinking on the night of 7 May 2022 near Camp Humphrey, Korea. (Pros. Ex. 1, p. 2; R. at 38). They left the bar around 0100 to 0130 that morning. (R. at 103). As they exited the bar, appellant observed an argument between a woman and a group of men. (Pros. Ex. 1, p. 2; R. at 38). The woman was shouting that someone sexually assaulted her. (Pros. Ex. 1, p. 2; R. at 38).

Rather than calling the authorities, appellant and his friends decided to personally intervene. (R. at 38). A fight broke out between SPC [REDACTED] and another individual. (R. at 38). Appellant joined the fight to “help” SPC [REDACTED]. (R. at 38). SGT [REDACTED] kicked LCpl [REDACTED], one of the intoxicated men arguing with the woman, in the head and apparently knocked him unconscious. (R. at 38). Rather than stopping, appellant walked over to the unconscious LCpl [REDACTED] and struck him in the head with

of the first specification, a specification of maiming, and a specification of conspiracy to commit an assault consummated by battery, in violation of Articles 128, 128a and 81, UCMJ, 10 U.S.C. § 928, 928a, 881 (2019). (R. at 75-76). The STR incorrectly indicates the court-martial found the appellant not guilty of those offenses. (STR).

his foot. (R. at 38). He kicked him intentionally and as LCpl [REDACTED] lay motionless on the ground. (R. at 47).

Prior to the trial, appellant entered a plea agreement with the government. In return for the government's dismissal of charges involving maiming and conspiracy and the government agreement that appellant could plead guilty to a lesser included offense of assault consummated by a battery, appellant agreed to a mandatory Bad Conduct Discharge and 60-120 days confinement. (App. Ex. X). Appellant received the benefit of his bargain when the government moved to dismiss the excepted language and charges to which appellant pled not guilty. (R. at 75). As part of his colloquy with the military judge the following took place:

MJ: Paragraph 7(a) (3) states that I shall adjudge a bad-conduct discharge. Do you understand that?

ACC: Yes, Your Honor.

MJ: Now, Private Armsbury, I just want to explain to you what the word ' shall ' means in that provision. It means that an action is mandatory and not permissive. That's what the word shall means, right? When it says that I shall, you know, I adjudge a bad-conduct discharge. In other words, if I accept your plea, according to this provision in the plea agreement that you signed and submitted to the convening authority, I have to adjudge a bad-conduct discharge as part of the sentence agreement. Do you understand that?

ACC: Yes, Your Honor.

...

MJ: Are you aware that if this provision had not been part of the plea agreement that you signed and submitted to the convening authority, that it is possible that this court-martial may not have to adjudge a bad-conduct discharge,

and that your chain of command may have tried instead to administratively separate you from the service?

ACC: Yes, Your Honor.

MJ: Are you also aware that an administrative separation is considered much less severe than a punitive discharge from a court-martial, and will not stigmatize you with a devastating and long-term effect of a punitive discharge from a court martial?

ACC: Yes, Your Honor.

MJ: Private Armsbury, knowing all that I and your defense counsel have explained to you regarding a bad-conduct discharge or the impact of a bad-conduct discharge, is it your express desire to be discharged from the service with a bad-conduct discharge as part of the plea agreement that you signed and submitted to the convening authority in this case?

ACC: Yes, Your Honor.

(R. at 68-69).

Standard of Review

When a Court of Criminal Appeals confronts a claim that two cases have disparate sentences, the appellant carries the burden of demonstrating the cases are closely related and his sentence is “highly disparate.” *United States v. Swisher*, __ M.J. __, 2024 CAAF LEXIS 395, *6-7 (C.A.A.F. 2024) (quoting *United States v. Lacy*, 50 M.J. at 288).

Law

A Court of Criminal Appeals “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Article 66(d)(1), UCMJ (2019). “[S]entence appropriateness should be judged by

‘individualized consideration’ of the particular accused ‘on the basis of 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)). “When [this court] conduct[s] a sentence appropriateness review, [this court] review[s] many factors to include: the sentence severity; the entire record of trial; appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct.” *Martinez*, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 2017). “Sentence appropriateness 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).

Notwithstanding the broad discretion afforded under Article 66(d), UCMJ, this court does not have “unfettered discretion” to take action on an imposed sentence “for any reason, for no reason, or on equitable grounds.” *United States v. Nerad*, 69 M.J. 138, 145 (C.A.A.F. 2010) (citation omitted). This grant of discretion to determine whether a sentence “should be approved” is based in law, not equity, and a court may only find a sentence to be inappropriate pursuant to principles of law. *See Nerad*, 69 M.J. at 146-47.

“Sentence comparison is only one of many aspects of sentence appropriateness.” *Martinez*, 76 M.J. at 840. It applies in “those rare instances in

which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.” *Id.* (quoting *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)). The “CCAs ‘are *required* to engage in sentence comparison...in those *rare instances* in which sentence appropriateness can be fairly determined *only* by reference to disparate sentences adjudged in closely related cases.” *Swisher*, __ M.J. __, 2024 CAAF LEXIS 395, at *6 (alterations in original) (quoting *United States v. Behunin*, 81 M.J. 158, 162 (C.A.A.F. 2023)).

“Pursuant to *Lacy*, cases are closely related if they fit within at least one of the following three categories: (A) the servicemembers were ‘coactors involved in a common crime,’ (B) the ‘servicemembers [were] involved in a common or parallel scheme,’ or (C) there was ‘some other direct nexus between the servicemembers whose sentences are sought to be compared.’” *United States v. Behunin*, 83 M.J. 158, 162 (C.A.A.F. 2023).

“As this case reflects, charging decisions by commanders in consultation with their trial counsel, as well as referral decisions by convening authorities after advice from their Staff Judge Advocates, can certainly lead to differences in sentencing.” *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001). “Just as ‘disparity in sentencing among codefendants is not, by itself, a sufficient ground for attacking an otherwise proper sentence under the [federal sentencing]

guidelines,' the military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military accused is sentenced as an individual." *Id.*

Argument

Appellant fails to demonstrate that the sentences at issue are "highly disparate," and even if he had met that initial burden the differences between the sentences are based on the specific facts of each accused's case.

As an initial matter, there are a number of similarities between SGT [REDACTED] and appellant's courts-martial. (Defense App. Ex. A). However, the government's position is that these cases were not closely related, even though at one point at the trial level they were part of the same case. While they both were part of an assault of LCpl [REDACTED], the two crimes were separate and distinct. Sergeant [REDACTED] kicked LCpl [REDACTED] C after he fell during a mutual affray and, although no defense applied, that assault was complete after the victim was out of the fight. In contrast and as he admitted, appellant's kick took place after the victim was clearly unconscious. (R. at 39). There was no evidence that SGT [REDACTED] and appellant were acting in coordination outside of the fact that both were in a group that was fighting another group. See *Behunin*, 83 M.J. at 163 (holding the CCA did not abuse its discretion when finding two similar crimes were not part of a common or parallel scheme).

Second, there is necessary nuance regarding appellant's assertion that case law supports the proposition that "courts often assume a sentence involving a bad-conduct discharge and a sentence with no punitive discharge are highly disparate." (App. Br. at 9). However, in *Durant*, the court stated "we will assume, without deciding, that appellant has met his burden of demonstrating the sentences are highly disparate" in a case where one co-accused received both a punitive discharge and one year of confinement compared to no punitive discharge and no confinement for the other. 55 M.J at 262. That court found that the sentences were appropriate despite the differing sentences.

This raises an important issue for the court. In a case where the accused has bargained for a specific outcome, he should be precluded from later arguing that the outcome was unjustly disparate, barring some collateral attack such as prosecutorial misconduct or ineffective assistance of counsel. Appellant knew of the various punishments for other Soldiers involved with this crime, except for SGT ■■■, and armed with that knowledge he bargained for a deal that included a mandatory punitive discharge. (R. at 135). That fact alone should halt any search for an unwarranted sentence disparity absent truly extraordinary facts, which are not apparent in the record of this trial. This is a different situation from guilty pleas where the sentencing authority has a range of punishments and chooses one that is higher than another based on an exercise of discretion. The sentencing

authority here had no choice; there was no discretion after the plea agreement was accepted.

Although in many guilty pleas the prosecution will often introduce evidence through the stipulation or testimony that explains the severity of the crime or culpability of the accused, it is plainly obvious that the record will not be as developed as a contested court-martial. This principle controls even more so in a guilty plea where a punitive discharge has already been negotiated and the military judge's discretion (with regards to sentencing) is limited to a time of confinement between 60-120 days.

If this Court nonetheless chooses to exercise its power of sentence review, the facts of this current case clearly warranted a punitive discharge and was just in comparison to the sentence SGT [REDACTED] received. Not only did appellant kick LCpl [REDACTED] in the head, but he did so after LCpl [REDACTED] was already out of the fight. Appellant's actions were gratuitous even in the context of a fight in which he should never have participated. Then, during his unsworn statement, appellant said the following:

Next, Your Honor, this whole process has taken almost a year and a half. That's a year and a half where I have been a black sheep in my unit, and a year and a half I have been stuck in limbo, unable to move to the next stage in my life. Last, Your Honor, it is tough for me to look around at all of the other people involved in the incident and compare their outcomes to my own. [SPC [REDACTED]] received a 75 day sentence, and was returned to our unit. He was not

discharged. [PFC ██████] is receiving a Chapter 10. I don't know what [SGT ██████] will end up with, but I am curious, Your Honor. I know what we did was wrong, and I know that each one of us did something different that night, and I know that we all deserve to be punished. But I just wish the Uniform Code of Military Justice was more uniform for us.

(R. at 134-35). Appellant decided that during his unsworn statement he would use part of that time to complain to the military judge about the impact his crime had on his own life and even at that juncture highlight that he was perhaps dissatisfied with his comparative sentence. Appellant's unsworn statement, including the excerpt above was less than five pages of the record of trial. (R. at 131-36.). In contrast SGT ██████'s unsworn statement (which included questioning from his defense counsel) spanned more than thirty pages. (Defense App. Ex. A. pp. 184-219).

Appellant raises a fair point regarding the expectations of an NCO versus a brand-new Soldier, however that argument cuts both ways. (App. Br. at 10-11). A brand-new Soldier simply does not have the breadth of mitigation or rehabilitation evidence as an NCO with more years of service. Appellant's career started in August of 2021. (Pros. Ex. 1). Sergeant ██████ career began in 2018 and he had numerous awards that could be expected of someone who made E-5 in less than four years (Def. App. Ex. A, Pros. Ex. 1, 2). Certainly, there is a rational

basis for a military judge to see in one the potential to rehabilitate and in the other, one who failed to adapt in the first place to Army Values.

Reducing appellant's sentence would result in an unearned windfall. Appellant bargained for a specific sentence, received the discharge he asked for and a sentence in keeping with his agreement. Appellant acted in a cowardly and gratuitous manner and presented no significant mitigation or rehabilitative evidence. Appellant deserved the sentence he earned through his actions and because of that this court should find that there was no unwarranted disparity in sentences between appellant and SGT [REDACTED]

Conclusion

This court should affirm the findings and sentence in this case.

[REDACTED]
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CERTIFICATE OF FILING AND SERVICE,

I certify that a copy of the foregoing was sent via electronic submission to the
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