UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BOBBY D. BAKER II
United States Air Force

ACM 34069 (f rev)

6 January 2003

Sentence adjudged 27 January 2000 by GCM convened at RAF Mildenhall, United Kingdom. Military Judge: Mary M. Boone.

Approved sentence: Bad-conduct discharge, confinement for 105 days and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel James R. Wise, Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

BURD, PECINOVSKY, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

BURD, Senior Judge:

On 25-27 January 2000, the appellant was tried by general court-martial composed of officer members at Royal Air Force (RAF) Mildenhall, United Kingdom (UK). Contrary to his pleas, the appellant was found guilty of two specifications of failure to obey a lawful order (one specification on divers occasions), in violation of Article 92, UCMJ, 10 U.S.C. § 892, larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921, sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925, and indecent acts with a child under the age of 16-years on divers occasions, in violation of Article 134, UCMJ,

10 U.S.C. § 934. He was found not guilty of indecent assault, alleged as a violation of Art. 134, UCMJ. His adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 105 days, and forfeiture of all pay and allowances.

The appellant's case was submitted to this Court on its merits. On 28 August 2000, we affirmed the approved findings and sentence. On 30 September 2002, the United States Court of Appeals for the Armed Forces (CAAF) affirmed in part and reversed in part our decision. *United States v. Baker*, 57 M.J. 330 (2002). The CAAF set aside the findings of guilty on Specification 2 of Charge I and Charge I, which alleged indecent acts with a child on divers occasions, and set aside the sentence. In remanding the case to this Court, the CAAF stated we may order a rehearing or dismiss the affected specification and reassess the sentence based on the remaining findings of guilty. *Id*. at 337. We will dismiss the affected allegations and reassess the sentence.

There is no practical reason to order a rehearing on the affected specification. While the offense of indecent acts with a child is serious, the facts in this case suggest some extenuation. *See* Rule for Courts-Martial (R.C.M.) 1001(c)(1)(B). The appellant was 18-years-old at the time of the offense. His victim was 15-years-old and described the appellant, in her testimony at trial, as her boyfriend. The logistical costs in conducting a rehearing outweigh any benefit that might be derived from such an exercise. Ultimately, we are satisfied that, given our options, justice will best be served by the decision we make herein.

We "may purge the prejudicial impact of an error at trial if [we] can determine that 'the accused's sentence would have been at least of a certain magnitude.'" *United States v. Harris*, 53 M.J. 86, 88 (2000) (quoting *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994) and *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). "No sentence higher than that which would have been adjudged absent error will be allowed to stand." *Harris*, 53 M.J. at 88 (quoting *Jones*, 39 M.J. at 317 (citing *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990))).

We are confident that, even with the modifications in the findings, the appellant would have received the adjudged bad-conduct discharge and some period of confinement. Absent the one specification, the maximum confinement would have been 6 years and 6 months rather than 13 years and 6 months as the court members were instructed. This difference would not have materially affected the sentence imposed and approved.

Specification 2 of Charge I, and Charge I are dismissed. We affirm only so much of the sentence as provides for a bad-conduct discharge and confinement for 90 days. The findings, as modified, and sentence, as reassessed, are correct in law and fact. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000)

and cases cited therein. Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

Judge PECINOVSKY participated in this decision before his retirement.

OFFICIAL

HEATHER D. LABE
Clerk of Court