UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ANTHONY E. CUTINO
United States Air Force

ACM S30239

12 November 2003

Sentence adjudged 24 September 2002 by SPCM convened at Buckley Air Force Base, Colorado. Military Judge: Patrick Rosenow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 21 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Spencer R. Fisher (legal intern).

Before

BRESLIN, MOODY, and BILLETT
Appellate Military Judges

OPINION OF THE COURT

BILLETT, Judge:

On 24 September 2002, the appellant was tried by a special court-martial consisting of a military judge sitting alone. He was charged with one specification of desertion, terminated by apprehension, under Article 85, UCMJ, 10 U.S.C.§ 885. He pled guilty to desertion and litigated whether the desertion was terminated by apprehension. The military judge found him guilty of desertion terminated by apprehension, as charged. The judge sentenced the appellant to a bad-conduct discharge, confinement for 4 months, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority only approved a bad-conduct discharge, confinement for 21 days,

and reduction to E-1. The appellant now appeals the judge's finding that his desertion was terminated by apprehension, and the appropriateness of his sentence.

I. Background

After three months of serving in the security forces squadron at his first permanent duty station, the appellant absented himself from his unit without authority on 12 August 2002 and remained outside military control until 3 September 2002. The only evidence offered at trial concerning the circumstances of his return to military control consists of a stipulation of fact entered into by the parties and offered to the military judge at trial. The salient portions of that stipulation will be summarized here.

Military authorities suspected that the appellant was in the South Florida area, since the appellant's wife's family lived there and she had gone there to seek medical treatment. They contacted the local police in the vicinity of appellant's in-laws and asked them to inquire of the appellant's relatives as to his whereabouts. The local police were given conflicting stories as to whether or not they had seen the appellant. On 21 August 2002, the police published a "Wanted" poster for the appellant and a warrant for his arrest was published by the National Crime Information Center. On 29 August 2002, the appellant's wife telephoned the appellant's commander in Colorado and informed him that the appellant would call him that day. The appellant did call the commander's office later on and left a voice mail message stating he would turn himself in to the law enforcement desk at Homestead Air Force Base on 3 September 2002 after his wife received the results of some medical tests. In response to this, the appellant's commander dispatched two members of his unit to South Florida to pick up the appellant.

The two security forces officers waited throughout the duty day on 3 September 2002 for the appellant to turn himself in. When he did not do so, they coordinated with local police and went to the residence of the appellant's in-laws. After they arrived, the appellant's wife and her relatives were initially uncooperative, stating that they did not know the appellant's whereabouts and they did not know how to contact him. After further discussions with the police, the appellant's father-in-law revealed that he could reach the appellant by telephone. The appellant was, in fact, staying in a house somewhere in the same neighborhood. The father-in-law called him. After the call, the contents of which are not known, the appellant left the place where he was staying and walked toward his in-laws' house. As he approached the house, he saw that the police were waiting for him. He made contact with the police and identified himself as the person they were looking for. According to the stipulation, the appellant "voluntarily" responded to his in-laws' house after the telephone call and "surrendered himself without incident to the Air Force Personnel."

II. Legal and factual sufficiency of "terminated by apprehension"

The maximum allowable sentence for desertion is greater when the desertion is terminated by apprehension. *Manual for Courts-Martial, United States*, (MCM), Part IV, ¶ 9e(2)(a) and (b). Since this case was tried as a special court-martial, a finding that the appellant's desertion was terminated by apprehension would not affect the maximum punishment allowable, but such a finding could potentially affect the sentence. For an accused's desertion to be terminated by apprehension, his or her return to military control must be involuntary. *United States v. Washington*, 24 M.J. 527 (A.F.C.M.R. 1987). There must be evidence proving a termination by apprehension. It cannot be presumed. *United States v. Nickaboine*, 11 C.M.R. 152 (C.M.A. 1953). The issue before us is whether the interplay between appellant and the military security forces *prior* to any exercise of physical control by the latter was of such a nature to coerce appellant into acting involuntarily.

Under Article 66(c), UCMJ, 10 U.S.C.§ 866(c), we will approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having heard the witnesses, we ourselves are convinced of the accused's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

Concerning the factual sufficiency of the military judge's finding, we are not convinced beyond a reasonable doubt that the appellant's apprehension was involuntary. We therefore affirm the findings of the military judge, excepting the words "he was apprehended."

Having affirmed findings of guilt to the lesser included offense, we must reassess the sentence or return the case for a rehearing on the sentence. We note that the military judge sentenced the appellant to a bad-conduct discharge, confinement for 4 months, and reduction to the grade of E-1. The convening authority approved only so much of the adjudged sentence as included a bad-conduct discharge, confinement for 21 days, and reduction to the grade of E-1. Reassessing the sentence under the criteria set out in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we find that the sentence as adjudged and approved is appropriate. We are convinced beyond a reasonable doubt that this "sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *Id.* at 307-08 (quoting *United States v. Suzuki*, 20 M.J. 248, 248 (C.M.A. 1985)).

III. Sentence Severity

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant also asserts that his sentence is inappropriately severe. He states that the unique circumstances surrounding his concern for his wife's health and his subsequent desertion make the imposition of a bad-conduct discharge unnecessarily harsh. In addressing this issue, we note that at trial the appellant asked the military judge to adjudge a bad-conduct discharge. We recognize, of course, that an appellant's request for a particular punishment cannot transform an inappropriately severe sentence into an appropriate one. *United States v. St. Ann*, 6 M.J. 563 (N.C.M.R. 1978). However, the appellant's request for a punitive discharge can be viewed as a strong indication of a lack of rehabilitative potential and is a significant factor for consideration. *United States v. Ray*, 51 M.J. 511 (N.M. Ct. Crim. App. 1999), *overruled in part on other grounds*, *United States v. Quiroz*, 53 M.J. 600 (N.M. Ct. Crim. App. 2000). Considering the nature of the offense and having given individualized consideration to the appellant, we find that the sentence is not inappropriately severe. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c) UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the modified findings and approved sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator