UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JONATHAN T. FORD
United States Air Force

ACM S31709

27 April 2010

Sentence adjudged 11 June 2009 by SPCM convened at Presidio of Monterey, California. Military Judge: Charles Wiedie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Frank R. Levi, Major Shannon A. Bennett, and Captain Reggie D. Yager.

Appellate Counsel for the United States: Colonel Douglas P. Cordova.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted of one specification of disobeying a superior commissioned officer on divers occasions, one specification of willful damage to military property, one specification of wrongful use of marijuana on divers occasions, one specification of wrongful use of ecstasy on divers occasions, one specification of wrongful use of Percocet, one specification of wrongful distribution of ecstasy on divers occasions, and one specification of prejudicial conduct by wrongful use of cough medicine on divers occasions, in violation of Article 90, 108, 112a, and 134 UCMJ, 10 U.S.C. §§ 890, 908, 912a, 934. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for six months, and reduction to E-1.

Although this case was submitted on its merits, the finding of guilty to distribution of ecstasy on divers occasions is not supported by the plea nor the Stipulation of Fact and will be remedied in the decretal paragraph.

Background

While in technical training, the appellant used marijuana at least six times, ecstasy at least three times, Percocet once, and misused cough medicine five times. He violated a no contact order on several occasions. In March 2009, the appellant was approached by one of his active duty drug buddies who asked for cocaine. The appellant said he could only get ecstasy for him and he did, but only one time. He also decided to decorate his billeting room by writing on the wall in marker.

Care Inquiry

During the *Care*[1] inquiry, the appellant was advised of the elements for a one-time distribution of ecstasy. He admitted the elements and providently explained his distribution. Although he pled to distribution on divers occasions and was found guilty of the same, it is clear from the record that all the parties were talking about a one-time distribution.

We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988).

We find the appellant guilty of all the charges and specifications except the words "on divers occasions" in Specification 4 of Charge III. Because we modified the findings we must reassess the sentence or remand the case for a sentencing rehearing. Before reassessing a sentence, this Court must be confident that, absent the error, "the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). "If [we] cannot determine that the sentence would have been at least of a certain magnitude absent the error, [we] must

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

order a rehearing." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

After modifying the findings, the maximum sentence remains the same, the jurisdictional limit of a special court-martial—a bad-conduct discharge, 12 months of confinement, forfeiture of two-thirds pay per month for 12 months, and reduction to the grade of E-1. Thus, the penalty landscape remains the same. Applying the criteria set forth in *United States v. Sales*, we conclude that we are able to determine what sentence would have been imposed based on the modified findings. As this was a judge alone trial and the military judge only discussed a one-time distribution, we are certain the military judge would have sentenced the appellant to the sentence adjudged—a bad-conduct discharge, six months of confinement, and reduction to the grade of E-1. We reassess the sentence accordingly. Furthermore, we find the sentence, as reassessed, to be appropriate. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

Conclusion

The findings, as modified, and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[2] The Court notes the Court-Martial Order (CMO), dated 18 August 2009, incorrectly states the sentence was adjudged on 11 June 2008 vice 11 June 2009. Additionally, the military judge's name is misspelled in the CMO. The Court orders the promulgation of a corrected CMO.