UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JAMES R. GALLEGOS
United States Air Force

ACM S30470

23 November 2005

Sentence adjudged 9 September 2003 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $767.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrea M. Gormel, Major Sandra K. Whittington, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Tracey L. Printer.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

The appellant was tried by officer members sitting as a special court-martial at Cannon Air Force Base, New Mexico. Contrary to his pleas, he was convicted of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The members sentenced him to a bad-conduct discharge, confinement for 2 months, forfeiture of $767.00 pay per month for 2 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant contends his sentence is too severe because it includes a bad-conduct discharge.[1] We disagree. However, we find error elsewhere, although not

[1] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

raised. Specifically, we find that the military judge erred when he instructed the court members that military confinement facilities are corrective rather than punitive.[2] Ultimately, we affirm the findings of guilty but reassess and modify the approved sentence.

Sentence Appropriateness

Article 66(c), UCMJ, 10 U.S.C. § 866(c), "requires this Court to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact and determines should be approved." *United States v. Amador*, 61 M.J. 619, 626 (A.F. Ct. Crim. App. 2005). The determination of sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *Id.* at 626 (quoting *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)).

Sentence appropriateness is judged by individualized consideration of the particular appellant on the basis of the nature and seriousness of the offense, the appellant's record of service, the character of the offender, 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. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959); *Amador*, 61 M.J. at 626.

We have given individualized consideration to this particular appellant and carefully reviewed the facts and circumstances of this case. We find that inclusion of a bad-conduct discharge as part of the appellant's sentence is appropriate.

The Military Judge's Instruction on Military Confinement Facilities

The military judge orally and in writing, properly instructed the members that confinement is a form of authorized punishment. See Article 58(a), UCMJ, 10 U.S.C. § 858(a). However, he also orally and in writing instructed the court members that military confinement facilities are corrective rather than punitive. The trial defense counsel did not object to either instruction. In *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005) (summary disposition), our superior court held it was prejudicial error for the military judge to instruct the court members that military confinement facilities are corrective rather than punitive. Accordingly, the Court affirmed the findings, but reversed as to sentence. We find the military judge in this case committed prejudicial error when he erroneously instructed the members that confinement facilities are corrective rather than punitive. *See Holmes*, 61 M.J. at 149. Having found error, we must determine whether we can reassess the sentence or should order a sentence rehearing.

[2] After the parties filed their briefs in this case, our superior court decided *United States v. Holmes*, 61 M.J. 148 (C.A.A.F. 2005) (summary disposition).

In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the analysis required in sentence reassessment:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id.* at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id.* at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

After carefully reviewing the record of trial, we are convinced we can determine that, absent the sentencing instruction error, the sentence would have been at least of a certain magnitude. Although we believe the members would have adjudged the same amount of confinement absent the sentencing instruction error, we are convinced beyond a reasonable doubt that by disapproving confinement for two months we will have assessed a punishment clearly no greater than the sentence the members would have imposed in the absence of error. *See Doss*, 57 M.J. at 185.

Accordingly, under the criteria set out in *Sales*, we reassess the sentence as follows: bad-conduct discharge, forfeiture of $767.00 pay per month for 2 months, and reduction to E-1.

Conclusion

The findings and 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). We affirm only so much of the sentence as includes a bad-conduct discharge, forfeiture of $767.00 pay per month for 2 months, and reduction to E-1. Accordingly, the findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court