UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman STEVEN L. JONES
United States Air Force

ACM 36965 (rem)

01 December 2010

Sentence adjudged 24 October 2006 by GCM convened at Incirlik Air Base, Turkey. Military Judge: Gordon R. Hammock.

Approved sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances for 15 months, and reduction to E-1.

Appellate Counsel for the Appellant: William E. Cassara, Esquire (civilian counsel) (argued), Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Reggie D. Yager, and Major Lance J. Wood.

Appellate Counsel for the United States: Major Brendon K. Tukey (argued), Colonel Don M. Christensen, Colonel Douglas P. Cordova, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Captain Michael T. Rakowski, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and GREGORY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

The appellant was arraigned on charges of rape, forcible sodomy, purchasing alcohol for minors, dishonorable failure to maintain sufficient funds in his checking account, and failure to go to his place of duty in violation of Articles 120, 125, 134, and

86, 10 U.S.C. §§ 920, 925, 934, 886. He pled not guilty to all the charges. He was found guilty as charged except for Charge I, for which he was found not guilty of rape but guilty of indecent acts in violation of Article 134, UCMJ. A panel of officers sentenced the appellant to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances for 18 months, and reduction to the grade of E-1. The convening authority reduced the forfeitures and confinement to 15 months each but otherwise approved the sentence as adjudged.

We affirmed the findings and sentence in an unpublished decision. *United States v. Jones*, ACM 36965 (A.F. Ct. Crim. App. 22 Oct 2008), *rev'd in part*, 68 M.J. 465 (C.A.A.F. 2010). Our superior court reversed this decision as to the finding of guilty of indecent acts under Charge I and the sentence. That finding was set aside and the Charge and its Specification were dismissed. The remaining findings of guilty were affirmed and the case was remanded to us to either reassess the sentence or to order a rehearing, as appropriate. *Jones*, 68 M.J. at 473. The appellant now asks that we reassess his sentence and approve only 12 months of confinement.

Law and Discussion

Before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been of at least a certain magnitude." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). A "dramatic change in the 'penalty landscape'" lessens 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, we must order a rehearing. *Doss*, 57 M.J. at 185 (citing *Sales*, 22 M.J. at 307).

After the dismissal of Charge I, the maximum sentence to confinement remains the same: life without the possibility of parole. This maximum, which is derived from the forcible sodomy charge, clearly shows that the approved finding of guilty of forcible sodomy is the most serious of the remaining charges. Thus, the "penalty landscape" was not substantially changed when the indecent acts finding was set aside and dismissed since forcible sodomy was the only nonconsensual sexual offense before the members in sentencing. Applying the criteria set forth in *Sales*, we conclude that we can determine what sentence would have been imposed based on the modified findings.

The appellant, a 19-year-old airman, spent the evening of 24 June 2006 with three high school students who were each 17 years old. The appellant and two of the students, including APH, consumed relatively large quantities of alcohol. Sometime during the evening, the appellant and APH were left alone. The charged sodomy and rape stemmed

from this encounter. As the appellant correctly points out, the finding of indecent acts instead of rape on the now dismissed Charge I remains relevant in assessing how the members viewed the evidence and helps inform our decision on reassessment.

The findings of the members show a split between what they viewed as consensual and nonconsensual sexual offenses during essentially the same encounter. While we cannot know exactly how this apparent split impacted the sentence, we are confident that, based on the evidence presented and absent the error, the sentence would have been at least a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances for 12 months, and reduction to the grade of E-1. We reassess the sentence accordingly.

Conclusion

After dismissing Charge I and its Specification, our superior court affirmed the remaining findings. We find that the sentence, as reassessed, is correct in law and fact. Article 66(c), UCMJ, 10 U.S.C. § 866(c). Accordingly, the sentence, as reassessed, is

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court