**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman BRYAN K. KREMPEL**
**United States Air Force**

**ACM S30849**

**18 October 2006**

Sentence adjudged 31 January 2005 by SPCM convened at Schriever Air Force Base, Colorado. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $823.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jeffrey A. Ferguson.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant stands convicted, in accordance with his pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced by a special court-martial consisting of officer and enlisted members to a bad-conduct discharge, confinement for 3 months, forfeiture of $823 pay per month for 3 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant does not challenge the providency of his plea and, finding no basis to disturb the findings of the court-martial, we affirm them. Article 66(c), UCMJ, 10 U.S.C. § 866(c). He does, however, assert that the military judge committed prejudicial error in two respects: first, by denying a challenge for cause against a court member, and second, by erroneously instructing the members that military confinement is "corrective rather than punitive." Finding error, we set aside the sentence and return the record for a rehearing on sentence only.

*Challenge for Cause of Master Sergeant (MSgt) M*

During voir dire, one of the enlisted members, MSgt M, informed the parties that he had served in law enforcement for thirteen-and-a-half years prior to assuming his present duties in satellite operations. About five-and-a-half years of MSgt M's law enforcement career was spent as an investigator. Both parties sought to inquire further about this experience in individual voir dire.

During this follow-up questioning, MSgt M disclosed that he investigated "about a dozen" drug cases while an investigator for the Air Force. He described his duties thusly: "I saw it as an opportunity to protect the government from someone who committed a crime. I investigated the crime and then *either* protected the government *or* put the person back to work." (emphasis added). He also testified that he sometimes felt, when a case he had worked on went to trial and the accused was acquitted, as though he "did all this work for nothing." He vowed, however, that there would be a "total disconnect" between those cases and his decision on the appellant's punishment.

Despite this assurance, the appellant challenged MSgt M for cause, arguing that MSgt M had an implied bias based on his history in law enforcement. The military judge denied the challenge for cause.

Military judges "are enjoined to be liberal in granting challenges for cause." *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003); *United States v. Smart*, 21 M.J. 15, 18-19 (C.M.A. 1985). In determining whether the military judge has complied with this injunction when ruling on a challenge for cause based on implied bias, appellate courts employ an objective standard "less deferential than abuse of discretion but more deferential than de novo." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002) (citing *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000)). Although the military judge's personal observation of a member's demeanor may inform his judgment when ruling on a challenge for cause, "implied bias is reviewed under an objective standard," viewed, not through the eyes of the military judge or court members, but "through the eyes of the public." *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (citing *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)).

MSgt M embraced a troubling dichotomy: that in dealing with crime one must choose between protecting the government or returning a servicemember to duty. Had the trial counsel urged such a choice on the members during argument ("Members, today you can either protect the Air Force, or put the accused back to work"), it would have been improper. *See United States v. Motsinger*, 34 M.J. 255, 257 (C.M.A. 1992); *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989). Yet the military judge did not attempt to clarify or correct MSgt M's views, but rather simply denied the challenge for cause. Focusing, as our superior appellate court has urged, on the critical "public perception of a fair and impartial court-martial panel," we conclude that the military judge erred. *See United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006).

*Instructional Error*

During instructions on sentencing, the military judge advised the members that "Military confinement facilities are corrective rather than punitive." This instruction was substantially in accord with the instruction in *United States v. Eatmon*, 47 M.J. 534, 539 (A.F. Ct. Crim. App. 1997). Subsequent to the appellant's court-martial, however, our superior appellate court held that instruction incorrect and prejudicial, and we overruled those portions of *Eatmon* approving the instruction. *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005) (summary disposition); *United States v. Brewster*, __ M.J. __, ACM 36106 (A.F. Ct. Crim. App. 26 Sep 2006).

In light of this error, and the improper denial of the appellant's challenge to MSgt M, we set aside the appellant's sentence. We do not find reassessment to be appropriate under the standards articulated in *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).

*Conclusion*

The findings are correct in law and fact and are affirmed. Article 66(c) UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The sentence is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority.[*] A rehearing on sentence is authorized.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[*] Given our disposition of the case, we need not address the appellant's assignment of error alleging that the convening authority did not consider one of the attachments to the appellant's clemency request.