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

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**UNITED STATES**

**v.**

**Airman Basic NICHOLAS KUHN**
**United States Air Force**

**ACM 35945**

**17 May 2006**

Sentence adjudged 17 March 2004 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Dishonorable discharge and confinement for 30 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, Major David P. Bennett, and Major Karen L. Hecker.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Major Michelle M. McCluer, and Major Heather L. Mazzeno.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT



SMITH, Judge:

In accordance with his pleas, the appellant was convicted of attempting to escape and conspiring to escape from the F.E. Warren Air Force Base, Wyoming, confinement facility, in violation of Articles 80 and 81, UCMJ, 10 U.S.C. §§ 880, 881. He also pled guilty and was convicted of aggravated assault and assault upon a person in the execution of law enforcement duties, both offenses in violation of Article 128, UCMJ, 10 U.S.C. §

928. The assaults occurred during the course of the escape attempt and form the basis of the appellant's assignment of errors.

The appellant contends that the two assault specifications were multiplicious for findings purposes and also amounted to an unreasonable multiplication of charges. Appellate government counsel concede the specifications were multiplicious for findings, and conclude that the military judge committed plain error by convicting the appellant of both offenses. We agree.

*Background*

The appellant was serving post-trial confinement from an earlier court-martial conviction when he conspired with another inmate, Airman Basic (AB) Hills, to escape. They took a metal rod from a clothing locker in the common area of the confinement facility, which they planned to use against the guard, Senior Airman (SrA) K, during the escape. The plan was for the appellant to distract SrA K while AB Hills prepared to incapacitate him.

Things went according to plan until they actually confronted SrA K, because he turned out to be tougher and more resilient than they expected. AB Hills hit SrA K in the head three times with the rod, but could not knock him out. The appellant grabbed SrA K from behind, in a bear hug, while AB Hills continued to swing the rod at SrA K. Despite his bleeding head wounds, SrA K dragged his two assailants with him as he triggered the distress alarm. SrA K then disarmed AB Hills and prevented the appellant from reaching the front door release button. The appellant fled to the laundry room and, while SrA K continued to struggle with AB Hills, another inmate called the law enforcement desk for help.

The attack left SrA K with head lacerations and the likelihood of permanent scarring from the wounds. He testified at trial that he suffered from throbbing pains in his head once or twice a week.

Specification 1 of Charge III alleged the appellant committed an aggravated assault on SrA K, "by striking him on the body with his hands and striking him on the head with a means or force likely to produce death or grievous bodily harm to wit: striking him on the head with a metal rod with force sufficient to cause a severe laceration."[1] Specification 2 of Charge III alleged the appellant assaulted SrA K, "who then was and was then known by the said Airman Basic Nicholas Kuhn to be a person then having and in the execution of Air Force security forces duties, by grabbing and striking him on the body with his hands and on the head with a metal rod." Appellate

[1] Although it was AB Hills who struck SrA K with his hands and with the metal rod, the appellant was liable for all offenses committed pursuant to the conspiracy. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 5(c)(5) (2005 ed.). This provision is the same as the previous edition of the *Manual* that was in effect at the time of trial.

government counsel concede the course of conduct described in Specification 1 is "essentially identical" to that described in Specification 2.

*Discussion*

The appellant did not raise multiplicity at trial, waived "all motions which may be waived" in his pretrial agreement with the convening authority, and pled guilty. Multiplicity claims are waived by an unconditional plea, so we review for plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000).

As counsel for both parties point out, this case is analogous to *United States v. Adams*, 49 M.J. 182 (C.A.A.F. 1998). While the President has permitted increased punishment for assaults based on the victim's status (here an assault committed upon a person in the execution of law enforcement duties),[2] Article 128, UCMJ, does not explicitly recognize such an offense. The result is that the appellant stands convicted, on identical facts, of aggravated assault and assault under the same statutory provision, Article 128, UCMJ. As our superior court explained in *Adams*, both convictions cannot stand. *Id.* at 186 ("[I]t is impossible to commit an aggravated assault under this statute without committing an assault as defined in this same statute.") Accordingly, we conclude the military judge committed plain error in finding the appellant guilty of both specifications of Charge III, and we now set aside the finding of guilty to Specification 2 of Charge III. *See* Rule for Courts-Martial 907(b)(3)(B) and its Discussion.

Having found error as to multiplicity, we need not address the alleged unreasonable multiplication of charges. We next consider whether we can reassess the sentence. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude, then [we] may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)).

We are confident we can reassess the sentence in accordance with the established criteria. We also are confident that, in the absence of Specification 2 of Charge III, the military judge's sentence would have been no different than the sentence he adjudged - a dishonorable discharge and confinement for 54 months. The gravity of the appellant's actions remains the same, and the maximum punishment (13 years without Specification 2) still far exceeds the sentence adjudged. We also conclude the sentence, as reassessed, is appropriate. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

[2] *See MCM*, Part IV, ¶ 54b(3)(b). It appears appellate counsel for both parties misunderstood the construction of Part IV of the *Manual*. The actual text of each punitive UCMJ article is reproduced in subparagraph "a" of its corresponding discussion paragraph in Part IV. (See the opening Discussion to Part IV.) The elements of the offense or offenses follow in each corresponding subparagraph "b." Both appellate briefs cite to nonexistent Article 128, UCMJ, subparagraphs (b)(3) and (4), instead of *MCM*, Part IV, ¶ 54b, subparagraphs (3) and (4).

*Conclusion*

The approved 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. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator