

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Staff Sergeant DANTE S. MILLER  
United States Air Force

ACM 35703

18 November 2005

Sentence adjudged 15 May 2003 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

ORR, JOHNSON, and JACOBSON  
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Judge:

We have examined the record of trial, the assignment of error,<sup>1</sup> and the government's response thereto. Finding no error, we affirm.

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<sup>1</sup> The asserted error, submitted to this court pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is: Whether the evidence is legally and factually sufficient to sustain appellant's conviction for desertion from 18 June 1990 until 17 November 2002 because on 10 December 1992 appellant presented himself to military authorities with the full intention of terminating his unauthorized absence.

The appellant was charged with deserting the Air Force on 18 June 1990, while assigned to Clark Air Base, Philippines, and remaining absent until 17 November 2002. He pled guilty to deserting between 18 June 1990 and 10 December 1992, but not guilty to the remainder of the charged time period. After the military judge accepted the appellant's guilty plea, the government presented evidence to prove desertion through 17 November 2002. The military judge subsequently found the appellant guilty of desertion during the entire charged time period.

During the findings phase, the appellant argued that he had attempted to return to military control on 10 December 1992 by presenting himself first to the United States Embassy, then to an Air Force captain at the Joint United States Military Assistance Group (JUSMAG) in Manila. He testified that the captain sent him back to the Embassy to complete paperwork necessary to re-enter the United States, but when he found out that he would have to pay almost \$200 in fees, he left the Embassy and returned to his home. He further testified that he made a few efforts over the ensuing 10 years to return to military control but was unsuccessful. These efforts included writing to his mother on one occasion to request she send him his naturalization number, and requesting assistance from an organization that helps United States servicemen return to the United States.

The government presented evidence that tended to show the appellant, after abandoning his initial half-hearted attempt to return to military control, never intended to terminate his absence. This evidence included testimony that the appellant started a new family in the Philippines, built a shack for his family to live in, and never made any real attempt to contact anyone who could assist him in returning to military control. The government pointed out that, despite the fact that the appellant had siblings in almost every branch of the United States military, he never contacted any of them to ask for their help or advice in regard to turning himself in. Additionally, a stipulation of expected testimony from the founder of the assistance organization the appellant claimed to have visited stated that there was no record of the appellant's visits, but conceded that any record of such visit could have been destroyed when they lost a computer hard drive. Finally, a letter written by the appellant to his brother in Texas in 2002 requested money to purchase a new roof for his shack, an indication that the appellant intended to stay where he was. It was only when the local law enforcement authority wanted to speak to the appellant about turning himself in that the appellant returned to JUSMAG and surrendered.

The appellant contends that the evidence is legally and factually insufficient to sustain his conviction for desertion between 10 December 1992 and 17 November 2002. Legal sufficiency is a question of law this Court reviews de novo. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82

(C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325 (citing *Jackson v. Virginia*, 443 U.S. at 319). We conclude that there is sufficient competent evidence in the record of trial to support the court's findings. Even if one were to believe the appellant's story about his attempted surrender to military authorities in December of 1992, the appellant clearly abandoned this attempt when he left the Embassy. The United States military did not see or hear from him again until after Philippine authorities approached him ten years later. After examining all the evidence and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 325; Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The approved findings and sentence 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 and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE  
Clerk of Court