UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CALVIN J. NORTHRUP
United States Air Force

ACM 35786

22 November 2005

Sentence adjudged 26 September 2003 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Lance B. Sigmon (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, 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 John C. Johnson.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, and the government's answer. The appellant contends his guilty plea to housebreaking in Specification 3 of Charge II was improvident. We agree and set aside the findings as to that specification. We also reassess the sentence and find the approved sentence appropriate nonetheless.

The appellant was a member of an Air Force Security Forces theft ring. He and his co-actors broke into three different buildings they were supposed to be protecting and stole military property, including gas masks, survival kits, knives, and a television. They entered two of them through a window and an unlocked door. The third they entered using a key the appellant had obtained legitimately.

The appellant now claims the military judge should not have accepted his guilty plea to housebreaking referenced in Specification 3 of Charge II. He contends that he did not enter that building unlawfully. In his providency inquiry, he told the military judge that he went into the building to get car parts in connection with his job. The military judge spotted this issue at trial and reviewed *United States v. Davis*, 56 M.J. 299 (C.A.A.F. 2002) after finding the appellant guilty, but prior to announcing the sentence. In expressing some concern about his decision to accept the plea, he noted that he did not consider Specification 3 of Charge II in arriving at the appellant's sentence.

We hold the appellant's guilty plea to Specification 3 of Charge II was improvident and set aside and dismiss the military judge's finding of guilty as to that specification. The appellant's assertion that at least a part of his purpose in entering the building was to legitimately obtain car parts distinguishes this case from *Davis*. In *Davis,* the accused had no legitimate reason for entering the building, only legitimate access to the key. *Id.*

Because we have set aside and dismissed one of the findings, we must now determine whether we can reassess the sentence in accordance with the criteria set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). We are convinced beyond a reasonable doubt that, even absent the error, the military judge would have sentenced the appellant to at least a bad-conduct discharge, confinement for 8 months, and reduction to E-1. The military judge anticipated our ruling on the findings and specifically noted that he did not consider Specification 3 of Charge II in sentencing the appellant. Accordingly we find the approved sentence appropriate under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994).

We have examined the appellant's other assignment of error and find it has no merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *Strickland v. Washington*, 466 U.S. 668 (1984). The remaining findings of guilty and the 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 findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court